

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2022

Public Authority: The Governing Body of Greasby Junior School
Address: 3 Mill Lane
Greasby
CH49 3AR

Decision (including any steps ordered)

1. On behalf of a union, the applicant requested information about pay progression. Greasby Junior School ('the School') withheld the information under section 40(2) of FOIA as it considered it to be other people's personal data which it would be unlawful to disclose.
2. The Commissioner's decision is as follows:
 - The information requested in the first part of the request can be categorised as other people's personal data and disclosing it would contravene the data protection legislation. Section 40(2) of FOIA is therefore engaged.
 - The School has not provided a response to the second part of the request and has breached section 10(1) of FOIA in that regard.
3. The Commissioner requires the School to take the following step to ensure compliance with the legislation:
 - Provide a response to the second element of the applicant's request that complies with FOIA.
4. The School must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 January 2022 the applicant wrote to the School and requested information in the following terms:

"This request is being made in accordance with the Freedom of Information Act 2000. We are seeking this information in order to evaluate the operation of the pay policy in practice. As you know, the NEU is, as a recognised trade union, entitled to receive this information for collective bargaining purposes in accordance with section 181 of the Trade Union and Labour Relations (Consolidation) Act 1992.

This information should already be available in connection with reporting pay progression decisions to governors; and to the MAT / LA given their obligation to complete a return to the DfE School Workforce Census.

[1] The information sought is set out, for convenience, on the attached Excel file. The information sought covers:

- The number of teachers eligible to be assessed for or (where relevant) apply for pay scale progression in September 2021.
- The numbers who received progression, were denied progression or (where relevant) did not apply for progression.
- Breakdowns by scale point and personal characteristics such as gender, ethnicity, full/part time status etc.

We are requesting that the information is provided on a headcount basis (i.e. actual numbers) not an FTE basis. The information, if provided as requested, will not allow individuals to be identified personally.

[2] We would also be grateful if you could provide information on how you are monitoring the outcomes of pay progression decisions including in relation to equality and what steps e.g. a pay audit have been adopted to indicate any possible trends."

6. The School responded on 18 January 2022. It advised it was withholding the requested information under section 40(2) of FOIA.
7. Following an internal review the School wrote to the applicant on 1 March 2022. It maintained its reliance on section 40(2).

Scope of the case

8. On behalf of the applicant, the complainant contacted the Commissioner on 18 March 2022 to complain about the way the request for information had been handled.
9. It appeared to the Commissioner that the applicant's request has two parts and that the School has responded to the first part but not to the second.
10. The Commissioner's investigation has therefore focussed on whether the School is entitled to withhold the information being sought in the first part of the request under section 40(2) of FOIA. He has also considered the School's non-response to the second part of the request.

Reasons for decision

Section 40 personal information

11. 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.
12. 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 UK General Data Protection Regulation ('UK GDPR').
13. 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.
14. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

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

17. 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.

18. 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.

19. In its internal review the School noted that the figures involved [with regard to the first part of the request] were significantly low and indicated that, therefore, specific individuals could be easily identified.

20. The Commissioner agrees that, in the context of a very small public authority, the small numbers involved and the level of detail requested, it would be possible to link the requested information to specific individuals. The information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

21. 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.

22. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

24. 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.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

26. Article 6(1) of the UK 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.

27. 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.

28. In considering the application of Article 6(1)(f) of the UK 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;

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
29. 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

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. The applicant submitted their request on behalf of a union. The union has an interest in pay matters at the School and that is a valid interest for them to have. There is also a wider public interest in public authorities being open and transparent.

Is disclosure necessary?

32. '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.
33. The Commissioner considers that disclosure would be necessary to address the applicant's interest and the wider public interest in transparency.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

34. It is necessary to balance the legitimate interests in disclosure against the data subjects' 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 the FOIA in response

to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

35. 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.
36. 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 individuals' general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
38. The information being sought concerns individuals in their professional capacity. However the information concerns the matter of those individuals' pay progression, which is likely to be linked to their performance. The Commissioner considers that the individuals concerned would reasonably expect that information about their pay and/or performance would not be disclosed to the world at large under FOIA. As such, disclosing that information would cause those individuals harm or distress.
39. The public interest in pay equity at the School, and transparency generally, may be met to an adequate degree if the School holds information within scope of the second part of the request that it will disclose.
40. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information requested in the first part of the request would not be lawful.
41. 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.

The Commissioner's view

42. The Commissioner has therefore decided that the School was entitled to withhold the information requested in the first part of the request under section 40(2), by way of section 40(3A)(a).

Section 1 – right of access to information held by public authorities / Section 10 – time for response

43. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information provided to them if it is held and is not exempt information
44. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
45. In this case, the applicant's request had a second element in which they requested information on how the School is monitoring the outcomes of pay progression decisions including in relation to equality. The Commissioner does not consider the School's section 40 refusal covers this part of the request and it appears from the information provided to him that the School did not respond to this part.
46. The School has therefore not complied with section 1(1) and section 10(1) of FOIA with regard to the second element of the request.

Right of appeal

47. 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

48. 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.
49. 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

Cressida Woodall
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