

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 March 2011

Public Authority: Worcestershire County Council
Address: County Hall
Spetchley Road
Worcester
WR5 2NP

Summary

The complainant requested information, for each school year from 2005/2006 to the date of the request, on the numbers and costs of cross-border placements of pupils with statements of Special Education Needs for SpLD/Dyslexia at a named school in Solihull. The Council refused to provide the information citing section 40(2) of the Act. The Commissioner has investigated the complaint and finds that the Council correctly applied section 40(2) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 18 March 2010, the complainant requested the following information from Worcestershire County Council ('the Council').

"I understand that Worcestershire LEA places, and/or has placed with statements of SEN for SpLD/Dyslexia at the [named school] in Solihull, which has an ARC (Additionally Resourced Centre) for such pupils. As this would be a cross-border placement, I would be pleased if you would supply me with the annual costs to your LEA of such placements as follows:

School Year 2005-6 2006-7 2007-8 2008-9 2009-10 2010-11 if known

No of placements at [named school] and ARC of pupils with placements for SpLD.

Payments to Solihull for these placements not including travel costs."

3. The Council provided a substantive response on 16 April 2010, in which it refused to provide the requested information, citing section 40(2)(3)(a)(i) of the Act which relates to personal information. The Council explained that the low numbers of pupils involved could lead to the identification of an individual or individuals.
4. On 19 May 2010 the complainant requested an internal review of the Council's decision and the Council communicated the outcome to the complainant on 21 June 2010. The Council upheld its original decision.

The Investigation

Scope of the case

5. On 22 July 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Council's application of section 40(2) of the Act.

Chronology

6. On 26 October 2010, the Commissioner contacted the Council to ask for a copy of the withheld information and for further detail of the reasoning behind its application of the exemption. The Commissioner received a response from the Council on 2 November 2010.
7. On 5 November 2010, the Commissioner asked the Council to provide details of information already in the public domain that would make it possible to link the withheld information to an identifiable individual or individuals.
8. The Council responded on 10 November 2010 and the Commissioner was satisfied from its response that disclosure of the withheld information would lead to a significant risk of identifiability.
9. The Commissioner therefore contacted the complainant on 16 November 2010 with a view to agreeing an informal resolution to this complaint. The complainant was not satisfied with this approach and requested a formal decision notice.

Analysis

Exemptions

Section 40(2) – Personal information

10. The full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
11. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
12. In its letter to the complainant dated 16 April 2010 the Council stated that the requested information was exempt from disclosure for the following reasons:

“...the information involves low numbers which could lead to the identification of an individual or individuals...disclosure would breach principle 1 of the Data Protection Act because it would not be fair and lawful, having regard for the rights of the individual or individuals, that information relating to specific educational need/s (including cost) was disclosed in the public domain.”

13. In order to reach a view on the Council's application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data.

Is the requested information personal data?

14. Personal data is defined at section 1(1) of the Data Protection Act 1998 (the “DPA”) as:

“personal data means data which relate to a living individual who can be identified-

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”*

15. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "*Determining what is personal data*".¹
16. Taking into account his guidance on this matter, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
 - (i) "*Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?*"
 - (ii) "*Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*"
17. The Commissioner considers that information relating to the number of pupils and the costs of the education of the pupil or pupils in question, if linked to identifiable individual or individuals, would constitute personal data.
18. The information requested concerns the numbers and costs of cross border placements for pupils with a statement of special educational needs for SpLD/Dyslexia. While on the face of it such information would not appear to constitute personal data, the Commissioner's view is that statistical or numerical information has the potential to constitute personal data. This is because, depending on the nature of the information in question, such information can sometimes be used to identify individuals. Conversely, the Commissioner believes that statistics that have been truly anonymised do not constitute personal data and will not therefore engage section 40 of the Act.
19. The Commissioner considers statistical information to be truly anonymised if the data controller (in this case the Council) takes steps to remove any linkage between the statistics and other information that could identify an individual.
20. The Commissioner does not accept that, where a data controller holds information which could potentially be used to identify living individuals from the anonymised data, this means that any disclosure of the anonymised data will be disclosure of personal data. The Commissioner

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

considers that even where the data controller holds additional 'identifying' information it does not prevent it from anonymising the information to the extent that if disclosed it would not be possible to identify any living individual from that information, and thus it would no longer be personal data.

21. The Commissioner draws support for this approach from the House of Lords' judgement in the case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47.
22. However, if a member of the general public could identify individuals by cross referencing the disclosed, 'anonymised' data with information already in the public domain, in the Commissioner's view the information will constitute personal data. Whether it is possible to identify individuals from the 'anonymised' data is a question of fact based on the circumstances of the specific case.
23. As outlined in paragraph 12 of this notice, the Council has argued that the figures and costs in question relate to 'small figure statistics' and, when linked with other information already in the public domain, disclosure could therefore lead to the identification of the pupil or pupils to which the information relates.
24. The complainant on the other hand has stated that the numbers are irrelevant (in privacy terms) due to his inability to name a single person or one of a crowd.
25. The Commissioner has considered the arguments of both the Council and the complainant and he is mindful of the fact that whilst the complainant may not be able to link the information to an individual or individuals, disclosure under the Act is considered to be disclosure to the public at large. If the Council disclosed the information to the complainant under the Act, it should also be prepared to disclose the same information to any other person who asks for it. The former Information Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC (EA/2006/0013)* (following *Hogan and Oxford City Council v The Information Commissioner (EA/2005/0026 and EA/2005/0030)*) confirmed that, "*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*" (paragraph 52):²

² http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf.

26. In the course of his investigation, the Commissioner therefore asked the Council to provide details of the information already in the public domain that could be used to link the withheld information to an identifiable individual or individuals.
27. The Council contacted the relevant school and was informed that teachers have access to the home addresses of pupils so it would be relatively easy for the teachers at the school to identify the pupil or pupils in question. The school added that the pupil or pupils were from vulnerable group(s) therefore administration staff responsible for organising the transport of the pupil or pupils would also be able to identify the individual or individuals in question. Taxi drivers who transported the pupil or pupils from home to school would also be able to identify the pupil or pupils. Additionally, it is probable that other pupils from the school would be aware of the addresses of their peers and would also be able to link the information to the relevant individual or individuals.
28. Although the Council did not put forward the following argument, the Commissioner also considers that it is possible that people in the locality of the pupil or pupils' home address(es) would also be able to link the requested information to the individual or individuals in question.
29. The Commissioner also believes that there is sufficient information in the public domain for a determined individual to work out the actual numbers of pupils from the details of the total costs to the Council. If the total costs were disclosed under the Act, it would be possible for a determined individual with some knowledge of costs of cross border placements for SpLD/Dyslexia or with knowledge of the costs of the named school, to work out the number or numbers of pupils the information related to. The Commissioner also notes the complainant's comments in earlier correspondence that he himself has significant experience in this area.
30. The Commissioner therefore considers that disclosure of the requested information, when linked to the information already in the public domain, makes it very likely that the individual pupil or pupils could be identified from the information. The Commissioner has therefore considered whether disclosure of the information would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

31. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - at least one of the conditions in schedule 2 is met, and

- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
32. In the case of personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.
33. The Commissioner has also considered whether this information would fall within the definition of sensitive personal data as defined by the DPA 1998. Part 1(2) of the DPA is concerned with the various categories of sensitive personal information. Section 2(e) relates to the physical or mental health or condition of the individual.
34. The British Dyslexia Association defines dyslexia as:
- “...a specific learning difficulty which mainly affects the development of literacy and language related skills.*
- It is likely to be present at birth and to be lifelong in its effects. It is characterised by difficulties with the phonological processing, rapid naming, working memory, processing speed, and the automatic development of skills that may not match up to an individual’s other cognitive abilities.”*
35. The Commissioner therefore considers that a diagnosis of dyslexia with an associated statement of special educational needs would fall within the category of information on an individual’s physical or mental health and in so doing, constitutes sensitive personal data, as defined by section 2(e) of the DPA.
36. As the Commissioner has determined that the information constitutes sensitive personal data as defined by section 2(e) of the DPA, a schedule 3 condition would also need to be met before disclosure could be considered to comply with the data protection principles.

Would disclosure be fair and lawful?

37. In considering whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- The reasonable expectations of the individual pupil or pupils.
 - Consequences of disclosure.
 - The legitimate interests of the public.

The reasonable expectations of the individual pupil or pupils

38. The Commissioner has considered the reasonable expectations of the pupil or pupils concerned. As stated in paragraph 35 of this notice, the Commissioner considers that a diagnosis of dyslexia would be classed as information relating to an individual's physical or mental health or condition. Dyslexia is also formally recognised as a disability under the Disability Discrimination Act 1995 (superseded by the Equality Act, 2010). The Commissioner therefore considers that the pupil or pupils would have a clear expectation that details regarding their diagnosis of dyslexia and associated statement of special educational needs would not be disclosed. The Commissioner also believes that this expectation is objectively reasonable.

Consequences of disclosure

39. As stated in paragraph 35 of this notice, the Commissioner considers the information in this case to relate to the data subject's or data subjects' physical or mental health or condition. As such, by its very nature, this is information that individuals regard as the most private information about themselves. The consequences of disclosure of this type of information into the public domain are likely to be significant upset and emotional distress to the pupil(s) concerned and their immediate family. Disclosure would remove the ability of individuals to control access to their most sensitive data and would result in a significant loss of privacy.

Legitimate public interest

40. The Commissioner accepts that there is a legitimate public interest in disclosure of information regarding cross-border placements of pupils with statements of special educational needs for SpLD/Dyslexia. In addition to the general principle of accountability and transparency in relation to decision making and spending within public authorities, there is a specific interest in this case in the decision making and spending of the Council's educational budget.

The balance between the rights and freedoms of the data subject(s) with the legitimate interests of the public.

41. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. The Commissioner considers that the nature of the information in this case is such that there would need to be a very strong legitimate public interest in disclosure to override the consequences of disclosure and the reasonable expectations of the data subjects. The Commissioner accepts in this case the existence of a legitimate public interest in disclosure of

information regarding cross-border placements of pupils with statements of special educational needs for SpLD/Dyslexia but he is mindful of the nature of the information itself, and the fact that it would fall within the definition of sensitive personal information. He has therefore concluded that the balance in this case is weighted considerably in favour of protecting the rights and freedoms of the data subject or subjects. In this case the Commissioner does not consider the public interest in the disclosure of the withheld information to outweigh the rights and freedoms of the data subjects – in particular the right to privacy.

42. In summary, and taking into account the above factors, the Commissioner has determined that disclosure of the withheld information would constitute the disclosure of personal data and that disclosure would not be fair. As such, the Commissioner has not considered whether a condition from schedule 2 or 3 of the DPA could be satisfied.

The Decision

43. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

44. The Commissioner requires no steps to be taken.

Right of Appeal

45. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 10th day of March 2011

Signed

**Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Personal information

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles,

The Data Protection Act 1998

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.