

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2014

Public Authority: The Governing Body of James Calvert Spence College

Address: South Ave, Amble,
Morpeth, Northumberland
NE65 0ND

Decision (including any steps ordered)

1. The complainant has requested information relating to complaints made by staff at James Calvert Spence College (JCSC).
2. The Commissioner's decision is that JCSC has correctly applied section 40(2) to part of the withheld information. In addition, the Commissioner finds that JCSC has breached section 1(1)(b) and section 10(1) of the FOIA.
3. The Commissioner requires the public authority to disclose the information detailed in the annex at the end of this decision notice.

Request and response

4. On 19 September 2013, the complainant wrote to JCSC and requested information in the following terms:

"Under the terms of the Act please provide the following information:

- i. *The number of recorded complaints made by classroom teachers or support staff about members of the Senior Leadership Team since the appointment of the current Executive Headteacher.*
- ii. *All information that exists in relation to the complaints disclosed in response to point 1 above.*
- iii. *The number of sick days taken by classroom teachers employed at JCSC. Please provide this as an annual breakdown since the appointment of the current Executive Headteacher.*

- iv. *The number of full-time-equivalent classroom teachers employed at JCSC. Please provide this as an annual breakdown since the appointment of the current Executive Headteacher.*
- v. *The number of classroom teachers that have resigned their posts at JCSC for reasons other than retirement. Please provide this as an annual breakdown since the appointment of the current Executive Headteacher.*

For the purposes of this request "classroom teacher" means any Main Pay Scale/Upper Pay Scale teacher employed on a permanent or fixed-term contract at James Calvert Spence College; the Senior Leadership Team means any teacher on the Leadership Pay Scale at James Calvert Spence College; James Calvert Spence College means both the South Avenue and Acklington Road sites."

5. On 16 October 2013 the complainant wrote to JCSC again reminding them of his request.
6. JCSC responded on 17 October 2013 advising that it had not received the request, and therefore it was treating the complainant's email of 16 October 2013 as the date of the request.
7. The complainant wrote to JCSC the same day stating:

"As my request has effectively marked time for the past 20 working days, please can you also consider the following as an additional request under section 1(1) of the Act: Please provide all information held by JCSC regarding the receipt/processing handling of my 19 September request for information."

8. On 12 November 2013 JCSC responded. It stated that it did not hold any information in relation to parts i) and ii) of the request. However, it did provide information in relation to parts iii), iv) and v) of the request.
9. Following an internal review JCSC wrote to the complainant on 21 November 2013. It revised its position and provided further information in relation to part i) of the request.
10. The complainant replied the same day stating:

"If you refer back to my original request you will see that JCSC's response to point 1, which you acknowledge was based on incorrect assumptions, has a direct bearing on its response to point 2. That being the case, I would now suggest that JCSC's initial response to point 2 is likely to be inadequate as well."

I would be grateful if you'd now reconsider JCSC's response to that second point."

11. Following intervention by the Commissioner JCSC provided a further internal review in relation to part ii) of the request. It refused to provide any information citing section 40(2) of the FOIA as its basis for doing so.

Background

12. The request was made following an article published on 7 September 2013 in 'The Journal'. The article was called "Teacher sends note to bosses before classroom suicide attempt". The complainant therefore requested information relating to any complaints made by staff of the school.

13. In its initial response to part 1 of the request JCSC stated that:

"It is known that some grievances were received in 2010 however, due to the nature of the grievances and the personnel involved, these were investigated by an external legal company. Therefore, all information pertaining to this may be held by them or have been passed to personnel who are no longer in a position within the College. As a result of this there are no records held within the College"

14. At the internal review stage JCSC stated:

"During the period covered by your question, in total 13 complaints and grievances were received from classroom teachers of support staff about the senior leadership team at the College and were passed to Muckle LLP, who were at the time acting for the then governors. Of these, six were raised as formal grievances, and seven as informal complaints. Two of the informal complaints were not pursued by the complainants; the others were independently investigated by Muckle LLP, who did not uphold any of them. The number of complaints and grievances needs to be seen in context: during the time they were received, a process was taking place which led to the closure of one school by the then governors for which a number of staff redundancies across the federation were made, during this time the Executive Head and senior leaders were asked to restructure all leaders across all schools"

15. As JCSC had provided this information in response to part 1 of the request, the complainant determined that this meant there should also be some recorded information held that would answer part 2 of his request.

16. The complainant therefore requested:

"I would be grateful if you'd now reconsider JCSC's response to that second point. I do not suppose that your summary contains 'all information' that exists in relation to those 13 complaints/grievances. 'All information' is likely to encompass a lot of possible disclosure documents held directly by JCSC or indirectly by Muckle on behalf of JCSC. It is extremely unlikely that 'all information' would ever be exempt from disclosure under the Act, however sensitive the content might be. The onus is on the public authority to assist the applicant and provide as much information as it reasonably can."

Scope of the case

17. The complainant contacted the Commissioner on 4 December 2013 to complain about the way his request for information had been handled.
18. The Commissioner considers the scope of this review to be to determine if JCSC has correctly applied section 40(2) of the FOIA to the withheld information.

Reasons for decision

19. The outstanding information relates to the following parts of the request.
 - i) *The number of recorded complaints made by classroom teachers or support staff about members of the Senior Leadership Team since the appointment of the current Executive Headteacher.*
 - ii) *All information that exists in relation to the complaints disclosed in response to point 1 above.*

Section 40(2) – third party personal data

20. Section 40(2) of the FOIA provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
21. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of information to any member of the public would contravene any of the principles of the Data Protection Act (DPA) 1998. This is an absolute exemption, and is therefore not subject to a public interest test.
22. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information

is the personal data of third parties, namely those who have made complaints or given statements.

23. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
24. In considering whether all the data requested is personal data the Commissioner has noted the description given by JCSC. It explained that the files included every document which the investigating officer acquired at any point in the process of investigating the grievances and complaints raised by staff, many of them of only tangential relevance to the investigation.
25. Due to the amount of documentation involved, the Commissioner agreed to review a sample of the information rather than all the withheld information. The sample consisted of a final report of the independent investigation and a sample of the notes taken at interviews with individuals, along with background material.
26. JCSC considered that some information fell outside the scope of the request and that some of it was not directly relevant to the request for "*all information that exists in relation to the complaints*", though JCSC considered the scope of the request was not entirely clear. In relation to this information JCSC considers this would be exempt from disclosure with regard to this request by virtue of section 21 - information is reasonably accessible by other means if it was caught by the request. This consists of:
 - ACAS Code of Practice and Northumberland County Council Grievance Procedure - published documents.
 - OFSTED inspection reports - published documents
 - Example school policies - published documents.
27. The Commissioner also considers that this information, if covered by the request would be exempt by virtue of section 21 of the FOIA.
28. In its submission to the Commissioner, JCSC considered that disclosing the requested information would lead to those individuals being identifiable and the Commissioner agrees. He is therefore satisfied that some of the information is the personal data of the staff members.
29. Having decided that some of the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).

30. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA. The Commissioner considered whether JCSC was correct when it argued that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'.
 31. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - What reasonable expectation do the individuals have about what will happen to their personal data?
 - Have the individuals given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
 32. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner therefore also finally considered these interests.
 33. *Expectation*: Whether an employee might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to the employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
 34. The information in this case concerns school staff members in their professional capacity. The Commissioner is satisfied, that the third parties named in the report might still reasonably expect that JCSC would not release their personal data, and so make it publicly available.
 35. This is because the matter that was the subject of the report was a grievance against another member of staff. Those staff contributing to the report did so on the understanding that the information they provided would be treated confidentially. The Commissioner has also seen a copy of the report and notes that it is clearly marked 'Strictly Private and Confidential'.
 36. *Consent*: JCSC has not approached the third parties named in the report
 37. for consent to their personal data being released.
 38. *Consequences of disclosure*: If this information was to be disclosed to the public, those individuals concerned could face difficulties in their

future careers, as well as animosity from other individuals who were not involved in the process.

39. This would in turn be likely to deter other teaching staff from raising what they consider to be legitimate concerns. This could be to the detriment of students and staff alike.
40. *Legitimate interest in disclosure to the public:* Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the individual's privacy. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
41. While the Commissioner accepts that there is a legitimate interest in overall transparency in the way a public authority such as schools and educational institutions conducts its business, there is no presumption that this should automatically take priority over personal privacy.
42. The Commissioner and Information Tribunal judge each case on its merits, for example, in the House of Commons/Baker case ref FS50072319, the Commissioner decided that disclosing personal data about MPs' travel claims would be fair. However, this was because:
 - MPs had not received assurance that information additional to that included in the House of Commons publication scheme would not be disclosed in the event of an individual request under the FOIA.
 - Disclosing this additional information would not impinge on MPs' personal privacy as the requested information related to individuals acting in an official as opposed to a private capacity.
 - Related information was already in the public domain.
 - Under Schedule 2 condition 6 of the DPA, there was considered to be a legitimate public interest in disclosing the information.
43. The requested information in the case that is the subject of this notice is clearly of private interest to the requester. However, the Commissioner is not convinced that this information, relating as it does to a local and specific matter, is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.
44. For this reason, the Commissioner considers that the possible arguments for disclosing the specific information in this case:
 - scrutiny of public officials' actions;

- public authority accountability; and
- the seriousness with which the Appointments Committee had treated events around the secret ballot

are not as compelling as those put forward for protecting the individuals' personal data, namely that:

- the contributors could reasonably expect their personal data would not be disclosed because the report's preparatory meetings were conducted in confidence, and the final report is marked 'Confidential';
 - contributors to the report have not consented to their personal data being released; and that
 - the possibility exists that disclosing the third party personal data will cause a degree of reputational damage to the individuals concerned. It may also cause distress to them, and wider, family members not directly involved in the matter that is the subject of the report.
45. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the data subjects and that it would not be fair to disclose parts of the requested information in this case. Consequently, the Commissioner considers that section 40(3)(a)(i) could be applied to this request, and that JCSC is correct to withhold some of the information. He did not therefore go on to consider any of the other conditions under section 40(3) or 40(4).
46. The Commissioner has identified some information that he considers is not personal data of third parties. He acknowledges JCSC's position that it considers all the information to be personal data of third parties and therefore the Commissioner has considered whether anonymisation is possible.
47. The Commissioner has issued guidance on this¹ and has accordingly referred to this when making his decision.

Is anonymisation always possible?

48. The Information Commissioner recognises that some collections of personal data do not lend themselves well to anonymisation – eg

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Practical_application/anonymisation-codev2.pdf

voluminous collections of paper records held in a variety of formats. Although the sensitivity of data will generally decrease with the passage of time, the inappropriate release of records many decades old, eg criminal records, could still have a severely detrimental effect on an individual. That is why the security of data that cannot be anonymised is paramount.

49. The concept of 'identify' – and therefore of 'anonymise' – is not straightforward because individuals can be identified in a number of different ways. This can include direct identification, where someone is explicitly identifiable from a single data source, such as a list including full names, and indirect identification, where two or more data sources need to be combined for identification to take place and a public authority may be satisfied that the data it intends to release does not, in itself, identify anyone. However, in some cases there may be other data available that means that re-identification by a third party is likely to take place.
50. The DPA is primarily concerned with the risks associated with the identification of individuals by data controllers. However, section 40 of the Freedom of Information Act 2000 (FOIA) introduces a broader concept of risk because its test for deciding whether personal data can be disclosed is whether disclosure to a member of the public would breach the data protection principles. This means that public authorities have to assess whether releasing apparently anonymised data to a member of the public would breach the data protection principles. This is intended to ensure that public authorities take into account the additional information that a particular member of the public might have that could allow data to be combined to produce information that relates to and identifies a particular individual – and that is therefore personal data.
51. The test in FOIA can be particularly difficult to apply in practice because different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
52. However, a motivated intruder test can go some way towards addressing this problem.
53. It is good practice to try to look at identification 'in the round', ie all organisations disclosing anonymised data should assess whether any organisation or member of the public could identify any individual from the data being released – either in itself or in combination with other available information. The risk involved will vary according to the local data environment and particularly who has access to information. This means that anonymised data disclosed within a secure local environment, eg when disclosed to a particular research organisation,

could remain anonymous even though if published, the likelihood of re-identification would mean that the anonymised data would become personal data.

The 'motivated intruder' test

54. Neither the DPA nor the FOIA provide any practical assistance in terms of helping organisations to determine whether:
 - a) the anonymised data they release is likely to result in the re-identification of an individual; or
 - b) whether anyone would have the motivation to carry out re-identification.
55. However a useful test – and one used by the Information Commissioner and the Tribunal that hears DPA and FOIA appeals – involves considering whether an 'intruder' would be able to achieve re-identification if motivated to attempt this.
56. The 'motivated intruder' is taken to be a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived. This test is meant to assess whether the motivated intruder would be successful. The approach assumes that the 'motivated intruder' is reasonably competent, has access to resources such as the internet, libraries, and all public documents, and would employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward. The 'motivated intruder' is not assumed to have any specialist knowledge such as computer hacking skills, or to have access to specialist equipment or to resort to criminality such as burglary, to gain access to data that is kept securely.
57. The 'motivated intruder' test is useful because it sets the bar for the risk of identification higher than considering whether a 'relatively inexpert' member of the public can achieve re-identification, but lower than considering whether someone with access to a great deal of specialist expertise, analytical power or prior knowledge could do so. It is therefore good practice to adopt a 'motivated intruder' test as part of a risk assessment. Carrying out a motivated intruder test in practice might include:
 - carrying out a web search to discover whether a combination of date of birth and postcode data can be used to reveal a particular individual's identity;

- searching the archives of national or local newspaper to see whether it is possible to associate a victim's name with crime map data;
- using social networking to see if it is possible to link anonymised data to a user's profile; or
- using the electoral register and local library resources to try to link anonymised data to someone's identity.

58. In this case the Commissioner has undertaken some research in an attempt to play the 'motivated intruder' and was unsuccessful in identifying any party related to the information requested.

59. Accordingly, the Commissioner considers that the risk of re-identification of any of the individuals is sufficiently low to allow some of the withheld information to be disclosed.

60. The information to be disclosed is detailed at the end of this decision notice. The Commissioner considers the remaining information to be exempt by virtue of section 40(2) and therefore this should remain withheld.

Section 1 and Section 10

61. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it. Section 10(1) states that this should be supplied within 20 working days.

62. When responding to the complaint, JCSC acknowledged that it held information within the scope of the request and provided some of the information held.

63. JCSC also provided further information at the internal review stage. However, Section 10(1) provides that "... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

64. In this case JCSC should have provided the information which the Commissioner has identified can be disclosed to the complainant. As this was not provided within the statutory time for compliance, the Commissioner finds that JCSC is in breach of section 1(1)(b) of the FOIA.

65. Consequently JCSC has not carried out this action within the statutory time for compliance and the Commissioner finds a breach of section 10(1) regardless of any internal review.

Other matters

66. The Commissioner notes that JCSC has had little experience dealing with FOI requests and has provided advice and guidance in order that it may be able to deal with future requests in a more timely and effective manner.

Right of appeal

67. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

68. 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.
69. 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

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

Information to be disclosed

- i. Front cover of report into grievances
- ii. Contents page of report
- iii. Introduction page of report (page 1) except the identity of the investigating officer
- iv. Page 6 from section 7 – Recurring Themes to para 8.1.14 inclusive
- v. Section 8.2 paragraph 8.2.1
- vi. Section 10 – in its entirety