

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 January 2016

**Public Authority:** Cheshire West and Chester Council

**Address:** HQ Building  
Nicholas Street  
Chester  
CH1 2NP

#### **Decision (including any steps ordered)**

---

1. The complainant has requested recorded information which concerns the conversion of Mill View Primary School to an independent academy. Cheshire West and Chester Council ("the Council") disclosed information to the complainant which is relevant to his request but withheld personal data in reliance on section 40(2) of the FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 40(2) to the majority of the information which it has withheld from the complainant. However, the Commissioner has identified one item of withheld information which concerns the complainant himself. He therefore finds that this should have been refused in reliance on section 40(1). The Commissioner has also decided that the Council has breached section 10 of the FOIA by failing to respond to the complainant's request within the twenty day compliance period.
3. The Commissioner requires the public authority to invite the complainant to submit a subject access request under section 7 of the Data Protection Act, for information which is the complainant's personal data and which falls within the scope of his request.
4. The public authority 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 8 January 2015, the complainant wrote to Cheshire west and Chester Council and requested information in the following terms:

*"On the 1<sup>st</sup> January 2015 Mill View Primary School converted to an independent academy. Please provide copies of any and all documents exchanged between the school and the Council in relation to the academy conversion. These documents should include (but not be restricted to) the long term lease agreement, the land transfer questionnaire, the commercial agreement, etc.*

*I would like the above information to be provided to me as electronic copies.*

*If the release of any of this information is prohibited on the grounds of breach of confidence, I ask that you supply me with copies of the confidentiality agreement and remind you that the information should not be treated as confidential if such an agreement has not been signed."*

6. The Council responded to the complainant's request on 10 April following the intervention of the Information Commissioner. The Council confirmed that it holds information relevant to the complainant's request and provided the following recorded information:

- Academy Conversion Checklist – blank
- Completed Mill View Checklist
- Letter to Headteachers and Governors regarding Academy conversion 16-09-2013
- Mill View Sports Partnership Agreement
- Mill View Contract Information
- Mill View Academy Lease

7. The Council advised the complainant that it holds no record of a land transfer questionnaire, informing him that it uses the academy checklist which it supplied. The Council also advised the complainant that parts of the documents have been redacted of personal data under section 40(2) of the FOIA, where the withheld information constitutes the personal data of third parties. The Council provided its rationale for the application of section 40(2).

8. On 15 April the complainant challenged the Council's response to his request: He asserted that all of the requested information had not been disclosed to him and he had not received an explanation of why that information is not being disclosed.

9. The complainant pointed out that the Transfer Agreement which was sent to him was an unsigned and undated draft agreement and that he requires a copy of the actual agreement executed between the parties<sup>1</sup>.
10. The complainant also asserted that the Council had not sent him copies of correspondence between the Council and the School (or the School's legal representatives) in relation to the provision of information required for the completion of the School's Land Transfer Questionnaire, which was submitted to the Department for Education as part of the academy conversion process. Consequently the complainant asked the Council for the following confirmation:

*"...that the school did not receive, from the school or its legal representatives, any enquiries whatsoever relating to the history of the school, including details of any change of category, and/or any particular arrangements that were made when it was set up, the current arrangements by which land is either held for the purpose of the school or used by the school (including the pattern of use and the nature of that land); and any existing arrangements allowing others to make use of the school's land.*

*OR Copies of all correspondence exchanged, between the council and the school's representatives, relating to the history of the school, including details of any change of category, and/or any particular arrangements, that were made when it was set up; the current arrangements by which land is either held for the purpose of the school or used by the school (including the pattern of use and the nature of that land); and any existing arrangements allowing others to make use of the school's land."*

11. Finally, the complainant challenged the Council's application of section 40(2) in respect of the redactions made to the information it had sent him.
12. On 22 April the complainant asked the Council to add a further item to his request for an internal review: Here, he challenged the Council's redaction of the staffing arrangement section from the Draft Transfer Agreement. The complainant asserted that he has a legitimate interest in knowing the staffing arrangements of the school and that there is a need for accountability and transparency associated with these arrangements. He further asserted that disclosure of the staffing

---

<sup>1</sup> This element of the complainant's request is considered in a separate decision notice under reference FER0583321, being the subject of a later request and complaint.

arrangements would be unlikely to result in unjustified adverse effects on the employees concerned.

13. On 9 June, the Council sent the complainant its internal review decision. The Council's decision was:

- Copies of the signed transfer agreement should be provided.
- Neither copies of any correspondence between the Council and the school (or the school's legal representatives) or confirmation that no correspondence exists have been provided. This part of the request should be addressed and responded to.
- The requested documentation - the executed counterpart leases, have been sent to the complainant.
- The completed Academy Conversion Checklist should be re-disclosed with the redacted section amended to a part redaction.
- Schedule 1 of the Transfer Agreement should be re-disclosed with the redactions amended to a part-redaction.
- The information outlined in the complainant's emails of 22 April should be addressed and responded to, and Schedule 1 of the Transfer Agreement should be re-disclosed with the redactions amended to a part-redaction.

### **Scope of the case**

---

14. The complainant contacted the Commissioner on 3 July 2015 to complain about the way his request for information had been handled. He expressed his concern about the significant number of redactions of personal data from the information the Council had disclosed to him and asserted that the redactions were made to deliberately conceal or withhold information from him.

15. The complainant also asserted that the information which the Council provided to him is incomplete, pointing out that a number of attachments are referred to in the information and stressing the Council has not disclosed any of those attachments.

16. The Commissioner's investigation of this complaint is focussed on the Council's application of section 40(2) to withhold the redacted third part personal data disclosed to the complainant. This notice sets out the Commissioner's decision solely in respect of the Council's application of section 40(2).

17. The Commissioner has asked the Council to revisit the initial request made by the complainant and identify the attachments referred to in the information it has previously disclosed to him. The Commissioner asked the Council to disclose the attachments, or alternatively, to issue a

refusal notice to the complainant under section 17 of the FOIA should it determine that the attachments or parts of the attachments should be withheld.

## Reasons for decision

---

### Section 40 – personal data

18. Section 40(2) provides an exemption from disclosure for information which is personal data of any third party and where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (“the DPA”) or section 10 of that Act.
19. In order to rely on the exemption provided by section 40, the information which the complainant seeks must constitute personal data as defined by the DPA. The DPA defines personal data as:  

‘...data which relates to a living individual who can be identified

  - a) From those data, or
  - b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
  - c) And includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.’
20. The Council has explained its position to the Commissioner in respect of the redactions of information made to the documents it had disclosed to the complainant: The Council holds the view that the redactions constitute the personal data of its recent former employees who were involved in the transfer of their employment to Mill View Academy under TUPE<sup>2</sup>. This information concerns the Headteacher, the teaching staff and other school staff.
21. The Council also holds the view that the redacted information meets the definition of personal information which is provided by section 1 of the DPA, and certain redacted information constitutes ‘sensitive’ personal information under the definition provided by section 2(d) of the DPA – where the information concerns whether the data subjects are members

---

<sup>2</sup> Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014

of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992).

22. The Commissioner has examined the information disclosed to the complainant and the information which is being withheld by the Council. This withheld information was found to be:

- Signatures of individuals party to the Sports Partnership agreement regarding Mill View Primary School.
- Schedule 1 and supporting appendices of the Transfer Agreement concerning Mill View Primary School's transfer to Cheshire Academies Trust. Schedule 1 makes reference to appendix 1 in respect of each of the School's employees. Appendix 1 relates to details of the employees' names, posts, sex, dates of birth, dates of service, remuneration, et al. It also makes reference to appendix 2 which requires details of dismissals/resignations in the last twelve months and the reasons for them.
- A redaction of information relating to the School's boundary contained within the Academy Conversion checklist.

23. In respect of the first two items above, the Commissioner agrees with the Council that the withheld information constitutes both personal data and sensitive personal data of third party individuals. Consequently the Commissioner must now consider whether disclosure of the withheld information would breach any of the data protection principles contained in Schedule 1 of the DPA.

24. In respect of the third item, the Commissioner finds that the redacted information relates to the complainant himself and consequently this information should have been refused in reliance of section 40(1).

25. The Commissioner considers that the first data protection principle is relevant to this case.

### **The first data protection principle**

26. The first data protection principle has two components:

1. Personal data must be processed fairly and lawfully, and
2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

27. The withheld information relates to the Council's former employees and is normally found within the Council's employee records.

28. The Council's employee records are normally confidential and it is for this reason that the Council asserts that its former employees have a reasonable expectation that their personal data is kept private. The Council asserts that disclosure of this personal data under the FOIA would be unfair and unreasonable and would therefore contravene the first data protection principle.
29. To reinforce its assertion, the Council makes the following points:
- The withheld information was not intended for public disclosure.
  - The information would lead to the identification of individuals.
  - The individuals concerned have had no opportunity to comment on the possible disclosure of the withheld information and they would have no control over its use.
  - The release of the information would cause unnecessary or unjustified damage or distress to the individuals concerned.
  - The rights of the Council's former employees override the right of third parties to receive this personal and sensitive personal data.
30. The Council maintains that disclosure of the withheld information would be unfair to the data subjects and consequently the Council holds the view that it is not required to consider whether any of the conditions in Schedules 2 and 3 of the DPA would allow the information to be disclosed. Notwithstanding this position, the Council strongly assert that only condition 6 of Schedule 2 would be relevant in the circumstances of this request.
31. Condition 6 states –
- "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
32. For the purpose of this case, the key word in condition 6 is 'necessary'.
33. Disclosure of information under the Freedom of Information Act has the effect of putting information into the public domain and it is not solely a disclosure to the complainant so that he can satisfy his purpose.
34. Here, the Council does not consider that any third party has a legitimate interest in the personal data and sensitive personal data which it has withheld from disclosure; and, given the lack of a legitimate interest, the

Council asserts there can be no necessity linked to it. In the Council's opinion the withheld information is personal data that a third party is not entitled to receive and, put simply, there is no case for transparency in respect of this personal data.

35. The Commissioner has considered the Council's representations in respect of the withheld information. He is satisfied that disclosure of the data subjects' personal data would be unfair and unwarranted and he finds that any legitimate interest in the conversion of the School to an academy is sufficiently met by the provision of the redacted documents which the Council has already disclosed.
36. The Commissioner considers that the data subjects would have no expectation that their personal data would be disclosed to the public in the circumstances of the complainant's request and this is particularly so at a time when the data subjects have recently been involved in a transfer of their employment from the Council to Cheshire Academies Trust. The Commissioner agrees with the Council that disclosure of the withheld information would likely cause the data subjects – its former employees – unwarranted distress and inconvenience, when they have likely received assurances that their personal data would not be shared or put at risk.
37. In view of the Commissioner's conclusion at paragraph 33 above, the Commissioner has decided that the Council is entitled to withhold the personal data of third parties in reliance on section 40(2) of the FOIA.
38. In respect of the third item (paragraph 22 above), the Commissioner finds that the Council incorrectly relied on section 40(2). The Council undoubtedly holds information from which it can ascertain that the information relates to the complainant himself and therefore this information should have been refused in reliance of section 40(1). The Council should have invited the complainant to submit a subject access request for this information under section 7(1) of the DPA.
39. The Commissioner has noted that the Council made its response to the complainant's request on 8 January 2015 on 10 April. The Council's response was clearly made after the twenty day compliance period had expired and consequently the Commissioner must find that the Council has contravened section 10 of the FOIA.

## **Other matters**

---

40. The Commissioner asked the Council to identify any other attachments referred to in the information it has previously disclosed to the



complainant and to either, disclose the contents of those attachments to the complainant or issue a refusal notice.

41. The Council has advised the Commissioner that the only attachments referred in the disclosed information are appendices 1 and 2 of Schedule 1 of the School's transfer agreement. The Commissioner's decision notice concerns of both appendices under his analysis of section 40(2) above.
42. The Commissioner accepts the Council's position in respect of the attachments referenced in the information disclosed to the complainant.
43. He notes the Council is open to any representation the complainant wishes to make in respect of any other attachments he considers should have been sent to him under his request of 8 January 2015.

## Right of appeal

---

44. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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**