

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 August 2017

**Public Authority:** Royal Borough of Greenwich  
**Address:** Legal Services  
4<sup>th</sup> Floor  
The Woolwich Centre  
Woolwich  
London  
SE18 6HQ

#### Decision (including any steps ordered)

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1. The complainant has requested from Royal Borough of Greenwich (the 'Council') information in respect of an individual and the health and safety actions taken relating to pupils at a particular school.
2. The Commissioner's decision is that the exemption at section 40(5) is applicable with regard to part 1 of the request.
3. In regards to the remaining parts of the request, the Commissioner's decision is that, on the balance of probabilities, the Council does not hold recorded information falling within the scope of the request. Therefore, the Commissioner does not require the Council to take any steps.

#### Request and response

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4. On 29 August 2016 the complainant wrote to the Council and requested information in the following terms:

*"1) In relation to the pupil (whom I mentioned in my email of 12/02/16 to the member of school staff [named individual]) who has serious health problems and who jumps over the school fence every day around 1pm thus leaving the school unaccompanied and without authorisation/permission:*

*a) Please disclose whether the aforementioned pupil is still at Thomas Tallis school? If not, please disclose the date on which he left Thomas Tallis school and the reason why he was discharged from the school.*

*b) Please specify how is the school supporting the special needs of the aforementioned pupil?*

*c) Please specify whether there were any changes/improvements introduced by the school regarding his care/support since 12/02/2016?*

*d) Please specify the type (or types) of funding allocated for the support of the special needs of the aforementioned pupil?*

*e) Please specify the amount of EHC plan personal budget or any other kind of funding which was allocated for the support of needs of the aforementioned pupil.*

*f) Please specify the details of how the aforementioned EHC plan personal budget or any other kind of funding was spent on supporting the needs of the aforementioned pupil.*

*g) Please specify details of agreed goals ('outcomes') which were set for the aforementioned pupil.*

*h) Please specify details of how the school will ensure that aforementioned pupil reaches his agreed goals ('outcomes') as set out in an Education Health and Care (EHC) plan.*

*2) What actions did the school take in order to ensure that conditions at LSU improve (curtain pole should be inaccessible to pupils, both pupils and staff should not be exposed to extreme temperatures.*

*3) What actions did the school take in order to ensure that the staff at LSU/school are properly trained in order to provide quality care of vulnerable pupils with special needs?*

*4) What actions did the Children's Services take in order to ensure that the school addressed the above issues?*

*5) Were there any new measures introduced by Children's Services at LSU/school after 12/02/2016 in order to improve health and safety/safeguarding of pupils?*

*6) Is there any monitoring system in place (introduced by Children's Services) in order to verify that the school conforms to legislation relating to health and safety/safeguarding of pupils?"*

5. On September 2016 the Council acknowledged receipt of the FOIA request.
6. On 5 December 2016 the Council provided its response to the complainant. It considered that compliance would breach the Data Protection Act 1998 (the DPA) in regards to part 1a – h of the information request.
7. The Council answered the remaining questions of the request and stated that it does not hold information to question (3). The Council advised the complainant to request this information from Thomas Tallis School.
8. On the same day the complainant requested an internal review which the Council subsequently conducted. The outcome was that the Council upheld its position.

### **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner has considered whether s40(5) of the FOIA applies to request 1.
11. In regards to the remaining parts of the request (questions 2 – 6) the Commissioner will consider whether, on the balance of probabilities, the Council holds information relevant to this request.

### **Reasons for decision**

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#### **Context**

12. The Commissioner understands that this request relates to a former pupil at Thomas Tallis School. The complainant had raised concerns relating to the health of the pupil who he referred to in his FOIA request.
13. The matters raised by the complainant had already been the subject of investigation by Ofsted and other organisations. An investigation was also conducted on whether the curtain pole (question 2 of request) posed any safeguarding concerns.

14. This request seeks information about the care and support of a particular school pupil and about actions taken within the school's Learning Support Unit regarding the complainant's health and safety concerns.

**Section 40(5) – personal data**

15. Section 40(5) provides that:

*The duty to confirm or deny-*

- (a) *Does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) *Does not arise in relation to other information if or to the extent that either*
- (i) *the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
- (ii) *by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (the data subject's right to be informed whether personal data being processed).*

16. In the circumstances of this case, the Commissioner recognises that confirming or denying whether the information is held would communicate details relating to care and support needs of the individual. Section 40(5) of the FOIA provides an exemption from the duty to confirm or deny that information is held when doing so would disclose the personal data of third parties, and by this contravene any of the data protection principles provided by the DPA.

## Is the information personal data?

17. The definition of personal data is set out in section 1 of the DPA:

*"...data which relate 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, 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 of the individual."*

18. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

19. The Commissioner considers that given the requested information relates to an individual and their care and support details, it is possible that the individual could be identified from it. Therefore, the Commissioner accepts that confirmation or denial as to whether any information is held would involve a disclosure of personal data.

## Sensitive personal data

20. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to an individual's:

- (a) racial or ethnic origin
- (b) political opinions
- (c) religious beliefs
- (d) trade union membership
- (e) physical or mental health
- (f) sexual life
- (g) criminal offences, sentences, proceedings or allegations.

21. The requested information in this case relates to personal data consisting of the individual's: (e) physical or mental health.

22. Information relating to physical or mental health carries a strong general expectation of privacy. If information of this kind was held by the Council and disclosed to the world at large, it may lead to unwanted communications or pose a risk to the individual's emotional wellbeing.
23. The Commissioner is satisfied that the requested information (parts 1a – h) is sensitive personal data. This is because it relates to the individual's physical or mental health. If information was held and released, this would lead to insight of the individual's health and support details which are confidential and should not be made public.

### **First data protection principle**

24. The first data protection principle requires, amongst other things, that the processing of personal data is fair. In considering fairness the Commissioner will take into account the reasonable expectations of the data subjects, what would be the consequences of disclosure, and the legitimate interests in the disclosure of the information in question.

### **Reasonable expectations of the individuals**

25. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
26. The Council considers that such disclosure (if held) would not be fair and taking into account the reasonable expectations of the individual concerned, the Council set out its reasons.
27. The Council considers that the student and/or their parent(s) would have a reasonable expectation that if held, the type of third party information sought would clearly attract a high level of expectation that it would not be disclosed.
28. The Council reported that the requested information, if held, would consist of both personal and sensitive information. It said that the information would contravene the first data protection principle, which requires that personal data is processed fairly and lawfully.

29. The Commissioner accepts that the individual and their parent(s) would have no reasonable expectation that information concerning the individual's care and support would be disclosed to the world at large. She considers that if held, disclosure would potentially be an invasion of the individual's privacy and could be distressing.

### **Consequences of disclosure**

30. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals.
31. The Council explained the possible consequences of disclosure of the information (if held) on the individual concerned. The Council considers that a request to ask the family for their consent to disclose the information is likely to increase unnecessary anxiety. It said that if the information was held and disclosed, the individual and their family members would suffer significant distress. The Council added that it would be unfair and a breach of the individual's rights to disclose (if held) the information requested.
32. The Council is of the view that the nature of the complainant's request is obvious that he is seeking personal and sensitive information. It believes that by answering his questions it would provide a clear insight into the individual's emotional, educational and psychological wellbeing.
33. The Commissioner considers the requested information is personal data and the act of confirming or denying whether information is held would breach the first data protection principle as it would be unfair to the individuals concerned. She accepts that the action would cause significant distress to the individual and their family.

### **Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure**

34. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(5) has been cited is in favour of protecting the privacy of the individuals. 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.

35. The Council considers that there is none or very little public interest value in the information the complainant is seeking. It said that disclosure of the information if held, would expose the Council to reputational risk, legal challenge and undermine the principles of *"The Data Protection (Subject Access Modification) (Social Work) order 2000; SI 2000 No 415."*
36. The complainant disputed the Council's view and argued that his request is in the public interest. He considers the information relates to the provision/quality of care and education for the Council's highly vulnerable pupil.
37. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individual and that it would not be fair to disclose the information if held, in this case. An individual has no expectations that their care and support details will be made public and there is very little value to the wider public in this.
38. The Commissioner upholds the Council's decision not to comply with the request as it considered that compliance would breach the DPA. She notes that the information in this case falls under section 2 of the DPA as it relates to the individual's health and support details. As such, by its very nature, this has been deemed to be information that individuals regard as private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the individual, the Commissioner considers that it would be unfair to disclose the requested information.

## **Section 1 – information not held**

39. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
40. In scenarios where there is a dispute as to whether a public authority holds any recorded information falling within the scope of a request the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
41. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any recorded information falling within the scope of a request (or was held at the time of such a request).

42. The Commissioner has therefore asked the Council to explain the searches it has carried out to determine that it does not hold the requested information.
43. The Council explained that it had investigated concerns in regards to 'safe guarding officer' and that no action was necessary by the Council. It confirmed that as far as it is aware, no information relevant to the scope of the request had been deleted or destroyed.
44. However, the Council said that it does have it recorded that Thomas Tallis School had participated in training courses and that this is offered to all schools as a traded service. The Council added that this loosely covers staff training on vulnerable pupils and children with special educational needs.

### **The Council's response to the remaining questions**

45. Question 3

The Council confirmed that it does not hold this information. It explained that schools are not obliged to share information with the Council on how it trains its staff.

46. Question 6

The Council had provided information to the complainant relating to this question.

47. The Commissioner is satisfied that in regards to these two questions (3 and 6) the request has been fully complied with in accordance with the legislation. Regarding the remaining questions – 2, 4 and 5 of the request, the Commissioner asked the Council to clarify its answers and the responses are as follows:

48. Question 2

The Council said that it had offered a response to the complainant following a safeguarding investigation conducted by the Council. This was further to the complaint to OFSTED which the complainant had submitted. The Council stated that it had relied on a letter, in part, within its response. The content of the correspondence confirmed that the curtain pole had been removed from the school and small fan heaters were issued to the unit.

49. Question 4

It stated that no action was deemed necessary by the Council to address the specific issues.

50. Question 5

It reported that there was no further action that needed to be taken by the Council to address health and safety concerns which the complainant had raised.

51. The Council confirmed that it has not located any further information relevant to the scope of the request following these searches.

52. On review of the Council's response to the Commissioner's enquiries, she is satisfied that it has carried out relevant searches for the requested information.

**The Commissioner's position**

53. The Commissioner's decision concerning the above questions is that on the balance of probabilities, the Council does not hold further recorded information falling within the scope of the request.

## Right of appeal

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54. 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)

55. 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.
56. 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** .....

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**