

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2018

Public Authority: Two Counties Trust Ltd
Address: Sutton Road
Kirkby-in-Ashfield
Nottingham
NG17 8HP

Decision (including any steps ordered)

1. The complainant has requested information about special payments made by the Two Counties Trust ('the Trust') to former employees of the Manor Academy. The Trust released some information and withheld some under section 40(2) of the FOIA (third person personal data).
2. The Commissioner's decision is that the Trust is correct to withhold the disputed information under section 40(2) of the FOIA. She also finds that the Trust provided adequate advice and assistance to the complainant and therefore did not breach section 16(1) of the FOIA.
3. The Commissioner does not require the Trust to take any steps.

Request and response

4. The Two Counties Trust Ltd is a multi-academy (school) trust established on 1 April 2016.
5. On 7 September 2017, the complainant wrote to the Trust and requested information in the following terms:

"According to the Academies Financial Handbook 2017, issued by the Education & Skills Funding Agency, 'special payments' are transactions that fall outside of The Two Counties Trusts' planned range of activities. They are either non-statutory or non-contractual and so are subject to greater control than other payments.

In particular I am interested in those special payments that specifically fall into a number of defined categories which have been made by the Two Counties Trust relating to the Manor Academy (DFE Reference 891/4032 - URN: 137158) during the period 1st October 2016 to 31st August 2017 (inclusive).

For ease of administration I have presented the information required in a table format which can be found at appendix 1 attached herewith."

Appendix 1 is contained in an appendix to this notice.

6. The Trust responded on 8 September 2017 and released some information:
 - The total number of employees in receipt of special payment by type in five categories (fewer than five in four of the categories, 'None' in the fifth).
 - The total value of payments made to employees by type with respect to the first two of the previous categories.
 - The Trust stated that it was unable to release the third and fifth of the categories – and the request for the total value of ex-gratia, voluntary exist and special severance payments, and the total value of payments made in lieu of notice – as it related to fewer than five individuals, which made those individuals identifiable. However the amount was less than the limits set out in the Handbook.
 - In all five categories the Trust gave the response 'NA' with regards to the 'Total number of special payments that have been approved by the Education and Skills Agency / HM Treasury as it exceeds the Trust's delegated levels by type'.
7. The Trust provided a review on 9 September 2017. It explained that it had withheld some information under section 40(2) of the FOIA as it considered this to be the personal data of third persons.

Scope of the case

8. The complainant contacted the Commissioner on 13 September 2017 to complain about the way his request for information had been handled.
9. Having reviewed the Trust's submission, the Commissioner's preliminary assessment was that the Trust had correctly applied section 40(2) to the information it had withheld. The complainant then provided the Commissioner with arguments to support his view that the public interest favours releasing the disputed information. The Commissioner agreed to consider the matter further.
10. The Commissioner's investigation has focussed on whether the information the Trust has withheld is exempt from disclosure under section 40(2) of the FOIA. She has also considered whether the Trust complied with section 16(1) in its handling of the request.

Reasons for decision

Section 40 – personal data

11. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the requester, and the conditions under either section 40(3)(a) or 40(4) are also satisfied.
12. The Commissioner has first considered whether the information the Trust has withheld is the personal data of a third party/parties.
Is the information personal data?
13. The Data Protection Act (DPA) says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
14. The withheld information – the total value of payments made - is associated with two of the five categories where the total number of employees in receipt of a particular special payment is fewer than five. The Commissioner is satisfied that this information relates to a small number of living individuals as it concerns a particular payment the Trust made to them.
15. The Commissioner has next considered whether the individuals can be identified from the information despite the individuals' name not being given.

16. In its submission to the Commissioner the Trust has said that while the FOIA is applicant and purpose 'blind', in this instance it is right that the complainant's identity should be taken into account and it has provided further explanation about this which the Commissioner is unable to detail in this notice.
17. The 'mosaic argument' comes into play in these circumstances. The term 'mosaic argument' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester.
18. In addition, the 'motivated intruder' test has some relevance here. The 'motivated intruder' test involves considering whether someone without any prior knowledge would be able to identify individuals through anonymized information, if motivated to attempt this. Such an individual might, for example, carry out a web search, search archives or use networking or social media in order to identify an individual from whose personal data, anonymized data has been derived. An individual might also be in a position to search related records held by their employer.
19. Since release under the FOIA is release to the wider world, it is also true that, potentially, current Trust employees would have access to additional corporate information that would, if they were motivated to do so, enable them to identify what individuals received particular payments, and the value of these payments, even if the anonymized information the complainant has requested was released.
20. Having considered the circumstances, the Commissioner is satisfied that the withheld information, despite being anonymised, could lead to individuals and the value of special payments they received being identified. She is therefore satisfied that this information can be categorized as personal data.
21. The Commissioner has gone on to consider whether any of the conditions under section 40(3) or 40(4) of the FOIA have been satisfied.
22. Section 40(3)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.

Is a condition under section 40(3) or 40(4) satisfied?

23. The Trust's position is that releasing the requested information would contravene the first data protection principle as it would not be lawful or fair to the individual concerned.
24. In assessing fairness, the Commissioner has considered whether the information relates to the public or private life of the individual; whether the individual has consented to their personal data being released and the reasonable expectations of the individual about what will happen to their personal data.
25. The withheld information relates to the public life of the individuals. However, the Commissioner understands that they have not consented to its release and she considers that they would have the reasonable expectation that their personal data would not be released into the wider world under the FOIA.
26. Despite the factors above, the withheld information may still be disclosed if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subject; that is, the individual concerned in this case.
27. The complainant has told the Commissioner who he considers the withheld information concerns. With regards to Manor Academy, the complainant has told the Commissioner, that during a workforce restructuring in February 2017 (which resulted from the Academy joining the Trust in September 2016), a concerned whistleblower highlighted the relatively high number of Manor Academy staff that were, in their words, "being paid off with public money". This was, they believed, instead of the Trust having to deal with staff grievances and it effectively short-circuited normal grievance, redundancy or capability processes.
28. The complainant detailed other concerns the whistleblower had raised with him, which the Commissioner has considered.
29. The complainant has referred the Commissioner to the Academies Financial Handbook 2017¹, issued by the Government's Education and

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633375/Academies_Financial_Handbook_2017.pdf

Skills Funding Agency. The complainant says the Handbook covers all of the requirements of the financial accountability system for academy trusts. It sets out all areas of HM Treasury's 'Managing Public Money' guidance that directly apply to trusts and all references to this guidance provide further explanation and clarification of the areas in question.

30. Section 3.1.8 of the 2017 version of the Handbook (effective from 1 September 2017) states: *"Irrespective of whether the Secretary of State's approval is required, academy trusts **must** disclose aggregate figures for transactions of any amount, and separate disclosure for individual transactions above £5,000, in their audited accounts for each of the following transactions:*

...

- *special payments - compensation (3.7)*
- *special payments - ex gratia (3.7) ..."*

31. Section 3.1.9 of the Handbook states: *"The following transactions **must** be disclosed in total, and individually:*

- *Special payments – staff severance, of any value (3.7)"*

32. Section 3.7.5 states *"Staff severance payments should not be made where they could be seen as a reward for failure, such as gross misconduct or poor performance."*

33. The complainant has told the Commissioner that the Trust's audited accounts are publicly accessible through Companies House. He says he has reviewed the Trust's most recent filed accounts at Companies House for the period ending 31 August 2017 but can find no mention of such payments as those referred to above. The complainant considers this to be a breach of the Academies Financial Handbook and argues that the information he has requested and which the Trust has withheld should therefore be publicly disclosed in any case.

34. Finally, the complainant has quoted the following from the Handbook:

"3.1.23 Use of confidentiality clauses

3.1.24 Academy trusts must ensure that the use of confidentiality clauses associated with staff severance payments do not prevent an

individual's right to make disclosures in the public interest (whistleblowing) under the Public Interest Disclosure Act 1998"

and has referred the Commissioner to the government's published 'Academies severance payments²' guidance.

35. It appears to the Commissioner that the payment that is of interest to the complainant is a payment the Trust categorised as an 'ex gratia' payment. The value of the separate payment made in lieu of notice, which the Trust has also withheld, would, the Commissioner understands, have been directly related to the salary of the individual concerned.
36. In addition, the complainant has noted that in his FOIA request he had originally asked for the total number of employees and the total cumulative value of special compensatory and ex gratia payments. He was of the view that the total number of employees who had received payments, and the total value of such payments, was sufficiently large as not to identify any one individual. He says that the Trust took a particular compensatory payment from the pool of such payments and presented it in its own unique category. He considers this gave the Trust justification for non-disclosure and considers that the Trust has tried to manipulate the FOIA rules to prevent disclosure.
37. The Commissioner wrote to the complainant on 28 February 2018 to ask him to clarify the above concern. In response the complainant suggested that, in order to comply with section 16 of the FOIA (duty to provide advice and assistance) the Trust should have tried to present the information that he has requested in a way that would have complied with the FOIA but which would have fulfilled his request in the public interest.
38. The Commissioner has reviewed the original table that the complainant sent to the Trust and the table the Trust provided in its response. The categories in the latter are the same as those in the former ie it appears that the Trust provided the information in the categories the complainant had requested. The Commissioner notes that the Trust's response appears not to include the final row of the table in the complainant's request, for the '*Grand Total of all Special Payments during the period 1 October 2016 to 31 August 2017*'.

² <https://www.gov.uk/guidance/academies-severance-payments>

39. The Trust has confirmed to the Commissioner that it has not released the information requested in the final row as it considers to do so would release the personal data of persons. This is because the 'Grand Total' would have to include the information relating to particular categories of requested information that contribute to the Grand Total, and that the Trust has withheld. Having considered this matter, the Commissioner is of the view that the Trust approached the complainant's request satisfactorily and did not breach section 16(1).
40. As above, the Commissioner has reviewed the complainant's original request and the Trust's response. The Trust has also provided her with the information it has withheld, including the information requested in the final row of the complainant's request.
41. The Trust has sought to address the complainant's concerns associated with the sections in the Academies Financial Handbook to which he has referred. It initially confirmed that the payment, the value of which has been withheld, was an ex gratia payment. The Trust noted that under section 3.1.8 of the Handbook there is a link to section 3.7 with regard to special payments which comprises: special staff severance, compensation and ex-gratia payments.
42. Section 3.7.12 deals with ex gratia payments specifically. Section 3.7.14 says that ex gratia payments are separate to other classes of special payment such as staff severance payments and compensation payments. Section 3.7.15 states that ex gratia payments **must** always be referred to the Education and Skills Funding Agency (ESFA) for prior authorisation (and that HM Treasury approval may also be needed).
43. The Trust told the Commissioner that external auditors have audited its accounts in accordance with the Handbook and that the auditors concluded that the value of the sums that have been withheld are such that they are not required to be reported. The Trust seemed to suggest that the Handbook advises that, with regards to *all* special payments, the financial limit over which academies need authorisation (not over which the payment needs to be reported, as such) is £50,000. The Commissioner reviewed section 3.7 of the Handbook and it appeared to her that while there is a £50,000 limit with respect to authorisation of special staff severance and compensation payments, there is no limit with respect to ex gratia payments and that **all** ex gratia payments need authorisation (from ESFA).
44. The Commissioner queried these points with the Trust. The Trust told her that the Handbook advises that, with regard to all special payments, the financial limit over which academies need approval is £50,000. It also confirmed that its external auditors (which it named and which is not ESFA) have audited its accounts in accordance with the Handbook.

The Trust says it had disclosed to the auditors all its financial transactions and the auditors concluded that particular sums, including, the Commissioner understands, the withheld information, are not required to be reported.

45. The Commissioner reviewed the Handbook again and all its references to the figure of £50,000. She was unable to find a reference to ex gratia payments under £50,000 not needing ESFA authorisation. It still seemed to her that section 3.7.15 of the Handbook requires that all ex gratia payments **must** be authorised by ESFA.
46. The Trust then conceded that it appeared it had used the term 'ex gratia' loosely to reflect the payment in question; that within the Handbook the term has a different and specific meaning, and that any payment meeting the 'ex gratia' definition requires ESFA approval. The Trust considered that its auditors may have made an error in not reporting the 'special payments' in the year, in the last set of accounts. It considered that if the auditors had done so they would have listed the transactions in total and individually, but in such a way that it would not be possible to identify any particular individual and the amount they received. The Trust noted that releasing an individual's personal data would be a breach of the DPA.
47. The Trust argued that, furthermore, in the majority of cases a termination payment is bound by a settlement agreement with the requisite confidentiality clauses. It considers this is important as the Trust has six schools and in the region of 1,000 employees across those schools. The Trust says in these circumstances, and as might be expected, there has been more than one occasion in the last year when a termination payment has been made. As such whilst the list of these termination or special payment transactions might have been listed individually in its accounts, there would never be an associated reference to any individual.
48. As noted above, the complainant has referred to section 3.1.23 of the Handbook. This concerns the use of confidentiality clauses, with section 3.1.24 stating that trusts must ensure that the use of confidentiality clauses associated with staff severance payments do not prevent an individual's right to make disclosures in the public interest. The Commissioner has taken this section into consideration in her public interest deliberations below.
49. The Commissioner has pursued this line of enquiry with the Trust - that is, the nature of the payment in question - not because she disagrees that, generally, information of this type (ie the value of a special payment that an identifiable individual received) would not be released into the public, but to ascertain whether in this specific case there is a

public interest in the requested information being released that is of such significance that it outweighs the right of the individual concerned not to have their personal data released. This is discussed further below.

50. With regards to the complainant's public interest arguments for disclosure, the references in section 3.1.8 of the Handbook to the requirement that sums of over £5,000 must be disclosed concerns disclosure in audited accounts specifically; they do not refer to disclosure to the wider world through the FOIA. As discussed above, the Trust has told the Commissioner that Companies House would take steps to ensure that individuals' personal data would not be released in those accounts when they are published.
51. Sections 3.1.9, 3.1.23 and 3.7.5 of the Handbook that the complainant has referred to concern staff severance payments. This may not be relevant here as the payment in question was categorised in the response to the complainant's request as an ex gratia payment and not a severance payment. As section 3.7.14 of the Handbook makes clear, ex gratia payments are separate from severance and compensation payments. However, the Commissioner notes there is some ambiguity as to the nature of the payment in question. The Trust may want to reconsider its categorisation of this payment to ensure it has been recorded appropriately – either as an 'ex gratia' payment which would need authorisation by ESFA before being disclosed in audited accounts, or as a severance or compensation payment above a set value, which would simply need to be disclosed in its audited accounts. How this particular payment has been categorised, or may be categorised in the future, is not an FOIA matter however and, as such, not a matter on which the Commissioner can adjudicate.
52. The Commissioner appreciates that the complainant and an unnamed whistleblower may have concerns about the value and nature of special payments made to staff associated with the Manor Academy. It seems to the Commissioner that, if there is an issue, it may concern the Trust's categorisation, authorisation and publication (or non-publication) of this particular payment in its audited accounts, and whether it has complied with the Handbook. These are not matters that the Commissioner can consider. The Commissioner must consider whether there is such a strong public interest in the disputed information being disclosed to the wider world under the FOIA that it outweighs the data subjects' legitimate interests.
53. The Commissioner is aware that, at May 2016, it was reported in the local press that the Manor Academy was "under fire" and had been placed back into special measures following an Ofsted inspection which had questioned the capacity of the school's leadership. She notes the

complainant's concerns at paragraphs 27 to 34 and the guidance in the Handbook that severance payments should not be made if they could be seen to reward failure or poor performance. As discussed, the nature and terms of the payment in question have not been confirmed, to the Commissioner or the complainant. The payment has been externally audited, however, and should be published in the Trust's accounts. The Commissioner notes that it is unlikely that, if and when it is published through Companies House, this information will be published in such a way as to reveal any individual's personal data.

54. The Commissioner has taken account of the fact that, although there appears to be some ambiguity about it, the payment in question may have been an ex gratia payment (which may therefore need retrospective authorisation by ESFA). However, regardless of the type of payment made, it relates to only one person and releasing the requested information would make that person identifiable. The Commissioner has also taken account of the value of the payment in question – which is well below the £50,000 authorisation threshold for severance and compensation payments – the fact that all the payments have been externally audited and, she understands, that these audited accounts are required to be published and should be in due course. She considers these last points do and will satisfy any public interest matters.
55. The complainant's concerns, whilst not unreasonable, are not so compelling that they outweigh the data subjects' legitimate interests on this occasion. The Commissioner's view therefore is that it would not be fair to release the withheld information under the FOIA; therefore a condition under section 40(3) has been met.
56. The Commissioner is satisfied that the Trust is correct to withhold the disputed information under section 40(2). It is the personal data of third persons and a condition under section 40(3) is satisfied because releasing it would breach the first data protection principle. Because a condition under section 40(3) has been met, it has not been necessary to consider the condition under section 40(4).

Right of appeal

57. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.
59. 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

APPENDIX

Appendix 1

Manor Academy

<i>'Special Payment' Type</i>	Total number of employees in receipt of a special payment by type	Total value of special payments made to employees by type (£)	Total number of special payments made to employees that have been approved by the Education & Skills Funding Agency/ HM Treasury as it exceeds the Trust's delegated levels by type
Total number of Staff Redundancy Payments made during the period 1st October 2016 to 31st August 2017 (include both voluntary and compulsory redundancies offered on either an individual basis or as part of a workforce-wide scheme)		£	
Total number of Staff Compensation Payments due as a matter of contractual entitlement made during the period 1 st October 2016 to 31 st August 2017		£	
Total number of Ex Gratia, Voluntary Exit and Special Severance Payments made to Staff during the period 1 st October 2016 to 31 st August 2017		£	
Total number of Discretionary Payments made to buy out actuarial reductions in staff pensions to allow for early retirement during the period 1 st October 2016 to 31 st August 2017			
Total number of Payments Made in Lieu of Notice during the period 1st October 2016 to 31st August 2017			
Grand Total of all Special Payments made during the period 1st October 2016 to 31st August 2017		£	