

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2018

Public Authority: Crossley Hall Primary School
Address: Thornton Road
Fairweather Green
Bradford
BD8 0HJ

Decision (including any steps ordered)

1. The complainant requested information from Crossley Hall Primary School, Bradford ("the school") relating to any investigation into, or reporting of, an incident which was alleged to have occurred at the school in 2012.
2. The school provided the complainant with some of her own personal data, which was relevant to the request, under the Data Protection Act 1998 (DPA). It stated that it was unable to provide further information because, if held, it would be exempt under the following sections of the FOIA: section 40(2) (third party personal data), section 41 (information provided in confidence), and/or section 43 (prejudicial to commercial interests).
3. The Commissioner has exercised her discretion to consider section 40(5) of the FOIA, which provides an exemption to the duty to confirm or deny whether information is held where to do so would disclose personal data in breach of the DPA. Her decision is that section 40(5) is engaged and that the school should have refused to confirm or deny whether it held the requested information.
4. The Commissioner does not require the school to take any steps.

Request and response

5. On 10 November 2017, the complainant wrote to the school stating that she wished to receive "*all of the information that you hold regarding my*

protected disclosure", and information relating to the *"disclosure"* of an alleged incident at the school.

6. The school responded on 21 November 2017. It considered the complainant's request to be a subject access request under the terms of the Data Protection Act 1998, which was then in force, and provided her with some information which comprised her own personal data.
7. On 5 December 2017, the complainant made the following request for information, clarifying, in the following terms, that she considered that the school would hold further information:

"I am concerned that there may not have been an adequate investigation carried out into my "Protected Disclosure" about [redacted] which I made on 28/05/2012. I am also concerned that there may not have been adequate investigations carried out into the relationship between [redacted], the governing body and their human resources advisers...

I am seeking... the evidence of the things that Crossley Hall Primary School did about "My Protected Disclosure" from receiving it on Monday 28th May 2012 e.g. how they reported the matter to the Council, when they launched an investigation, copies of the interviews of witnesses (especially my signed witness interview) and the final investigation report complete with its findings and action points".

8. The school responded on 29 December 2017 and explained that the requested information, if held, would be exempt from disclosure under section 40(2) of the FOIA – third party personal data - and section 43 of the FOIA – commercial interests.
9. Further correspondence followed, and the Commissioner is satisfied that the school had the opportunity to reconsider its handling of the request, thereby effectively carrying out an internal review.

Background to the request

10. The complainant's request related to an incident which was alleged to have occurred at the school in 2012 and which was reported by the ATL Union to Bradford Metropolitan Bough Council ("the Council"). The alleged incident involved a senior member of staff whose identity is known to the complainant.
11. The complainant had been working at the school at the time of the alleged incident, but was no longer working there at the date of her request.

Scope of the case

12. The complainant contacted the Commissioner on 12 March 2018 to complain about the way her request for information had been handled.
13. The Commissioner separately carried out an investigation into what was provided to the complainant in response to her subject access request. The Commissioner explained to the complainant that, under the powers granted to her by the FOIA, she would also be able to investigate whether the school held any additional information which it should consider providing under the FOIA.
14. During the course of the investigations, the school wrote to the complainant again on 17 July 2018. With regard to information which did not pertain to her personally, it reiterated its position that such information, if held, would be exempt under section 40(2) and section 43 and also stated that it would additionally be exempt under section 41 of the FOIA – information provided in confidence.
15. The Commissioner has discretion to consider exemptions not cited by the public authority. Given her role as the data protection regulator, the Commissioner will, in particular, consider whether to exercise that discretion to consider any limb of section 40 where necessary to avoid any breach of data protection law.
16. The school, as explained above, cited a number of exemptions from the FOIA. However, the Commissioner's view is that, for the reasons given below, the wording of the request would mean that confirming or denying whether the requested information was held would itself involve a disclosure of third party personal data, which, as explained below, may also be sensitive personal data.
17. As a result, her view is that section 40(5) of the FOIA should have been cited, which provides an exemption from the duty to confirm or deny whether information is held where to do so would involve disclosing personal data and where that disclosure would be in breach of any of the data protection principles.
18. The approach of the Commissioner is that a public authority can cite further exemptions during her investigation, including exemptions from the duty to confirm or deny even where it had previously indicated that information is held. She takes the same approach when exercising her discretion to consider exemptions not cited by the public authority. Particularly where to do otherwise would perpetuate a data protection breach, this may mean belatedly applying an exemption from the duty to confirm or deny.

19. The Commissioner's view is that the school should have refused to confirm or deny whether it held the requested information, and cited the exemption provided by section 40(5) of the FOIA.
20. The analysis below therefore covers the application of section 40(5) to the request.

Reasons for decision

Section 40(5) – neither confirm nor deny in relation to personal information

21. Section 40(5) of the FOIA states that:

"The duty to confirm or deny [whether information is held] —

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 (data subject's right to be informed whether personal data being processed)".

22. The duty to confirm or deny whether requested information is held is imposed by section 1(1)(a) of the FOIA. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve a disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.
23. With regard to whether confirmation or denial in response to the complainant's request would involve a disclosure of personal data, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA). Whilst the DPA 1998 has since been replaced, as it

applied at the time of the response to the complainant's information request, it is relevant here. Section 1(1) of the DPA states that:

" 'personal data' means data which relate to a living individual who can be identified:

a) from those data, or

b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller."

24. Complying with section 1(1)(a) in this case would effectively confirm or deny whether an investigation had been carried out into an alleged incident involving a senior member of staff ("the data subject") whose identity is known to the complainant, and/or whether the alleged incident had been reported by the school. The alleged incident is of a sensitive nature. This would both relate to and identify the data subject and therefore would clearly be their personal data.
25. Section 2 of the DPA sets out what categories of personal data are classed as sensitive for the purposes of that Act. From her awareness of the nature of the alleged incident at the school, the Commissioner considers that the information, if held, may be the sensitive personal data of the data subject.
26. Having found that compliance with section 1(1)(a) in this case would involve a disclosure of personal data, the next step is to address whether that disclosure would be in breach of any of the data protection principles. The Commissioner has focused here on the first data protection principle, which requires that personal data is processed fairly and lawfully.
27. In considering fairness, the Commissioner finds it useful to consider the reasonable expectations of the data subject and the potential consequences of the disclosure, and to balance any legitimate public interest in disclosing the information against the rights and freedoms of the relevant individual.

The reasonable expectations of the data subject

28. When considering whether the disclosure of personal information 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.

29. In this case, the school has stated that it considers that it has a duty of confidentiality to all of its staff. It considers that disclosure would not reasonably be expected by the data subject, and considers that the data subject has a reasonable expectation that the existence or otherwise of information of the type requested would remain confidential. Consequently, the data subject would not reasonably expect the school to confirm or deny publicly whether it held the information requested in this case, and has not consented to it doing so.
30. The Commissioner is satisfied that the data subject would not reasonably expect the school to state publicly whether it held the information requested in this case.

The consequences of disclosure

31. In this case, the school has argued that there is a likelihood of damage and distress to the data subject if information of the type requested were disclosed. The Commissioner has therefore considered whether there is a likelihood of damage and distress to the data subject if the school were to confirm or deny whether the information is held.
32. In the Commissioner's guidance¹ on dealing with requests for information about public authority employees, it states that disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
33. The school considers that the ensuing damage and distress to the data subject in this case would not be justified due to the nature of the alleged incident, which is of a sensitive nature.
34. The Commissioner considers in this case that damage and distress to the data subject would be likely to be caused by the school confirming or denying whether the information requested is held.

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure

35. It may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so.
36. The Commissioner's approach is that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data, the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming or denying whether or not information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
37. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
38. The public interest in this case centres on the fact that an allegation was made regarding a senior member of staff which, the complainant believes, would have been investigated by the school as well as by a number of other organisations.
39. The complainant's position is that she wishes to ensure that a full investigation was carried out by the school into the alleged incident and she considers that this is a matter of importance to the public.

The Commissioner's decision

40. The Commissioner has considered these arguments and agrees that there is some wider public interest in the school confirming or denying whether information is held in this case.
41. She notes that the complainant already has some personal knowledge of the alleged incident, and that some information which relates to the alleged incident has already been disclosed to the complainant in response to her subject access request, as it comprised her own personal data.
42. However, disclosure under the FOIA is disclosure to the world at large, and the Commissioner must therefore consider whether the wider public interest in the school confirming or denying, to the world at large, whether it holds the requested information, outweighs the rights and freedoms of the data subject in this case.

43. In this case, her view is that the rights and freedoms of the individual in this case, which concerns a matter of some sensitivity, are not outweighed by the wider public interest.
44. The Commissioner is satisfied that confirming or denying whether the requested information is held would not be fair, and would therefore breach the first data protection principle, in light of the nature of the information and the likely intrusion of privacy and potential distress to the data subject. She has determined that these arguments outweigh any legitimate interest in disclosure.
45. The Commissioner therefore considers the exemption at section 40(5) is engaged and the duty to confirm or deny whether information within the scope of the complainant's request is held does not arise.

Right of appeal

46. 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

47. 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.
48. 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

**Ben Tomes
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