

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2019

Public Authority: Royal School, Dungannon

Address: 2 Ranfurly Road
Dungannon, County Tyrone
BT71 6EG

Decision (including any steps ordered)

1. The complainants have requested information from the School in relation to a specific Duke of Edinburgh expedition in which students and teachers from the School participated. The School disclosed some information to the complainants and refused to disclose some information or disclosed it with redactions, citing section 40(2) of the FOIA as a basis for non-disclosure. It stated that it did not hold the remaining information requested.
2. The Commissioner's decision is that the School has correctly applied section 40(2) of the FOIA to the withheld information and that it has complied with Section 1 of the FOIA as it has disclosed all information it holds within the scope of the complainants' request save for that withheld under section 40(2) of the FOIA.
3. Therefore, the Commissioner requires no steps to be taken.

Request and response

4. The complainants on 25 October 2018 made a request for information relating to a Duke of Edinburgh expedition to the School in the following terms:-

"We request (under FOI/EIR) a copy of all paperwork in relation to this expedition – all paperwork including route card used, risk assessments, reports, notes of phone calls, e-mails, arrangements made for the expedition, note to parents, any discussion between staff, assessor, EA, DoE and anyone else involved. Also, please provide copies of the most recent training certificates for all adults involved.

We also request in writing details of the School's planned disciplinary action for [alleged behaviour of certain students during the expedition] which has had a life-changing effect on [name redacted]."

5. The School responded to the complainants on 19 November 2018, providing them with part of the requested information, i.e. redacted pre-expedition documentation and disciplinary documentation, also information in relation to staff training. The School stated that it was not possible to provide the complainant with any further documentation in relation to their request.
6. The complainants again wrote to the School on 5 December 2018, requesting that the School clarify what specific documents cannot be provided under the FOIA/EIR/GDPR and the reasons for this. The complainants also requested details of a conversation regarding completion of the expedition.
7. The School responded to the complainants on 13 December 2018, stating that it had reviewed all issues raised and was content with its responses.
8. Following correspondence from the Commissioner, the School then decided to treat the complainants' letter of 5 December 2018 as a request for internal review, and carried out such a review accordingly.
9. The internal review response was provided to the complainant on 8 February 2019. The School provided some further documentation to the complainant, however it reiterated that it did not hold some of the documentation requested and that it was applying section 40(2) of the FOIA in respect of other documentation requested, which it did hold.

Scope of the case

10. The complainants initially contacted the Commissioner on 19 December 2018 to complain about the way their request for information had been handled.
11. The Commissioner wrote to the School on 17 April 2019 seeking its detailed submissions as to its application of the exemption set out in section 40(2) of the FOIA. The School responded to the Commissioner on 17 May 2019.
12. The Commissioner has considered the School's handling of the complainant's request, in particular its application of the above exemption.

Reasons for decision

Information not held – section 1 of the FOIA

13. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.]*

14. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.

15. The complainants requested certain specific information e.g. notes of telephone calls and conversations, also letters to parents regarding the expedition. The School confirmed in its internal review response that it does not hold such information, other than notes of a telephone call which it provided to the complainant. The School also confirmed verbally to the Commissioner that such information does not exist and was never held by the School, as these calls and conversations either did not take place or were never recorded in any manner. The complainants have not provided any evidence to suggest that the School does hold information of this nature which it has not provided to them. The Commissioner's view is that the School does not hold any recorded information within the scope of that part of the complainants' request.
16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

Section 40(2) -third party personal data

17. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
18. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

21. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. The information withheld by the School under section 40(2) is information which refers to staff, students and former students by name and with reference to training and plans for the forthcoming expedition.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to several data subjects. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA. The School has erroneously referred to some of the withheld information as ‘sensitive personal data.’ This is now referred to under the GDPR as ‘special category data.’ From perusing the withheld information, the Commissioner does not consider any of the withheld information to be special category data.
27. The fact that information constitutes the personal data of an identifiable living individual or individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

30. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

32. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the....lawful bases for processing listed in the Article applies.*

33. The Commissioner considers that the most applicable lawful basis in this case is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

36. In considering any legitimate interest(s) in the disclosure of the withheld information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
38. The Commissioner understands that the complainants are concerned about the preparation for, and practical handling of, a Duke of Edinburgh expedition in which staff and students from the School participated and believe that the expedition was handled in an unprofessional manner. The Commissioner also recognises there are legitimate interests in transparency and accountability.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. The Commissioner, having viewed the information withheld under this exemption, notes that it is information about staff at the School and some students, past and present. This information exists as a record of the School's preparation and organisation of the expedition.
41. It is not clear to the Commissioner how disclosure of the withheld information would be necessary in order to meet the complainant's legitimate interests. The information is information that would be expected to be documented in e-mails and notes as a record of the organisation of the School's participation in the expedition. The complainant's legitimate interest in the information stems from the belief that the School organised the expedition and handled it and its aftermath in an unprofessional manner. Disclosing the withheld information under the FOIA to the world at large would seem to be

disproportionately intrusive to meet this interest as it would reveal detail about staff and students which is not otherwise in the public domain.

42. The request relates to the complainants' child, now a past student of the School. If there was information on the child contained within the withheld information, there would be a less intrusive method of obtaining this as it would be exempt under section 40(1) of the FOIA and considered under the subject access provisions of the DPA. Indeed, the Commissioner understands that the complainants' child, although over 13 and having the right to make a Subject Access Request (SAR) herself, has provided consent for the complainants to make such a request on her behalf. The Commissioner understands that the complainants did make such a request to the School, following discussions with the Commissioner.
43. However, the Commissioner cannot dismiss the complainants' legitimate interest in the information and it does seem that disclosure would allow for the complainants to properly scrutinise the information in order to better understand the organisation of the expedition and the viewpoints of those who participated in it. Disclosure of the withheld information is therefore 'necessary' to meet the legitimate interests already identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

44. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information

relates to an employee in their professional role or to them in their private life as individuals, and the purpose for which they provided their personal data.

46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
47. The Commissioner considers that the individuals concerned in this case would have a reasonable expectation that the documents constituting personal data in the withheld information would not be made public. The Commissioner accepts that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects. Those data subjects include the child of the complainants, who would be likely to also be caused unwarranted damage or distress by unexpected disclosure of her personal data, however this may have been received in response to her SAR. Therefore her personal information would only be disclosed to her rather than to the world at large.
48. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
49. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Right of appeal

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

51. 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.
52. 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

Deirdre Collins

Senior Case Officer

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Reference: FS50808532