

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2020

Public Authority: Diocese of Leicester Academies Trust

Address: St Peter & St Paul Church Academy
Upper Church Street
Syston
Leicester LE7 1HR

Decision (including any steps ordered)

1. The complainant requested agendas and minutes of governors' meetings held at Christ Church and St Peter's Primary School, Leicester ("the school") during the academic year 2018 – 2019. The school is a member of a multi-academy trust, Diocese of Leicester Academies Trust ("the Trust") which is, therefore, the public authority with responsibility for fulfilling the request. The Trust provided the minutes, but redacted some information from them under section 40(2) of the FOIA – personal information.
2. The Commissioner's decision is that the Trust withheld some information correctly. However, the Commissioner has determined that some of the withheld information is not personal data within the definition at section 3(2) of the Data Protection Act 2018, and was therefore withheld incorrectly. She has also determined that other parts of the withheld information, while being personal data, may lawfully be disclosed, for the reasons set out in this notice.
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation.
 - Disclose the information specified in paragraphs 22-25 and 60 of this notice, which has been more precisely described in a separate, confidential cover letter to the Trust.

4. The Trust 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 12 July 2019 the complainant made the following request for information:

"Under the Freedom of Information Act may I request the Agenda and minutes of all governors board meetings held at Christ Church and St Peter's School for the academic year 18/19".

6. On 2 August 2019, the Trust responded and provided some information. It made some redactions and stated *"these are to protect the data of individuals, but the redactions are not related to discussions about the SEMH resource base"*.
7. The complainant requested an internal review on 27 August 2019. In her letter she questioned the extent of the redactions, and whether any documents may be missing in their entirety.
8. The Trust sent her the outcome of its internal review on 6 September 2019. It confirmed nothing had been withheld in its entirety and stated that the redactions had been made *"in accordance with GDPR regulations"*.

Scope of the case

9. The complainant contacted the Commissioner on 18 September 2019 to complain about the way her request for information had been handled.
10. As the Trust had not specified any grounds from the FOIA for withholding information during its correspondence with the complainant, the Commissioner contacted the Trust for clarification about which exemption(s) under the FOIA it considered applied to the redacted information. The Trust explained that it considered that the information was exempt under section 40(2) of the FOIA – third party personal data.
11. The sets of minutes provided to the complainant are dated, respectively, 1 October 2018, 12 November 2018, 4 February 2019, 8 April 2019, 29 April 2019 and 17 June 2019. Each set was partly redacted.

12. This decision notice covers whether the relevant information was correctly withheld under section 40(2) of the FOIA.

Reasons for decision

Section 40(2) – third party personal data

13. 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.
14. 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”).
15. 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.
16. 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.

Is the information personal data?

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

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

18. The two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
19. 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.

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

20. 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.
21. The Commissioner has considered the withheld information in this case. She is satisfied that much of it both identifies and relates to living individuals, as explained further on in this notice.
22. However, she has determined that this is not the case for all of the withheld information. The Commissioner has identified that certain sections of the information, while they may contain an individual's name or initials², do not relate to any individual in terms of the content of the information. An example would be where a named individual is relaying general information to the meeting, or is referred to as taking forward an action on behalf of the governing body: the body of the information does not relate to the named individual.
23. Under the DPA definition, this differs from information which identifies an individual and also relates to them, for example by setting out their opinion, or discussing their performance.

Information which is not "personal data"

24. Specifically, the Commissioner is satisfied that certain information redacted by the Trust does not relate to individuals. This information has been identified in the separate confidential cover letter, to the Trust.
25. Since this information does not relate to individuals, the Commissioner is satisfied that it does not fall within the definition of "personal data" at section 3(2) of the DPA. With regard to this information, the Trust has failed to demonstrate that section 40(2) is engaged.
26. The Commissioner therefore orders the Trust to disclose the information referred to above and precisely identified in the separate cover letter.

Personal data

27. Having considered the remainder of the withheld information, the Commissioner is satisfied that it relates to a number of data subjects, including staff members, members of the governing body and school pupils. She is satisfied that this information both identifies and relates to

² Since the names and/or initials identify and relate to living individuals in this case, they are, in themselves, personal data. Whether or not these should be disclosed is covered in paragraphs 69 and 70 of this notice.

these data subjects, and therefore falls within the definition of "personal data" in section 3(2) of the DPA.

28. The fact that information constitutes the personal data of an identifiable living individual 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. The most relevant DP principle in this case is at Article 5(1)(a) of the GDPR, and is known as 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 an FOIA request, 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.

Is disclosure lawful?

31. 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. It must also be generally lawful.

32. The Commissioner considers that the lawful basis most applicable 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"*³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

33. 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 therefore 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.
34. 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

35. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The Commissioner is satisfied in this case that there is a legitimate interest in the matters discussed by the school’s governing body. In addition to the general requirement for transparency, the relevant meetings were held during a period of proposed restructuring at the Trust which affected its member schools, and which provoked considerable local media coverage.

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

Is disclosure necessary?

37. "Necessary" means more than desirable, but less than indispensable or of 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.
38. Although some information about the school and the Trust, and about decisions taken by the school's governing body, is in the public domain, minutes naturally contain details which may not, otherwise, be made public; they include matters deemed by the school and/or Trust to be of a confidential nature. Since these are not likely to be made public except through a freedom of information request, the Commissioner is satisfied that disclosure of the withheld information under the FOIA would be necessary to meet the legitimate interests described above.

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

39. 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.
40. 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 individual expressed concern about the disclosure; and
 - the reasonable expectations of the individual.

41. The Commissioner has considered the personal data in three categories.

(1) Personal data of children

42. In considering the remainder of the withheld information, the Commissioner has first considered item 8 from the minutes of 1 October

2018, and the redacted part of item 9 from the minutes dated 4 February 2019. This information relates to, respectively, school exclusions, and the performance of specific pupil groups.

43. Since this information identifies and relates to children, the Commissioner exercises additional caution. She does not consider that the pupils would have any expectation that their personal data would be disclosed in response to a freedom of information request, and considers that, due to the nature of the information, to do so would cause damage and distress to the families.
44. The Commissioner is satisfied the rights and freedoms of those pupils outweigh the legitimate interests in the disclosure of the information, and this information from the minutes was correctly withheld by the Trust under section 40(2) of the Trust.
45. 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.

(2) Personal data of adults who are not senior staff

46. The Commissioner has next considered information relating to adult individuals who were not (at the date of the request) senior Trust staff members. In some cases, the individuals were at the meetings; in some cases they were not, but their actions and behaviour were being reported on at the meetings. This information has been precisely identified to the Trust in the separate cover letter.
47. As indicated above, a key issue in considering whether personal data may lawfully be disclosed is whether the data subjects have a reasonable expectation that their information will not be disclosed.
48. In the case of those data subjects who were not present at the meetings, the Commissioner considers that they would have no expectation that discussions and allegations about their actions and behaviour, which they were not able either to confirm, comment on or deny, since they were not at the meetings, would be made public. The Commissioner also considers that disclosure of this information would be likely to cause distress and damage to those individuals, simply by being an intrusion into their privacy.
49. With regard to those individuals who were at the meetings but who, as explained, are not senior staff members, it is evident that discussions were being conducted with some expectation of confidentiality, due to the wide-ranging nature of matters discussed (including children's data, as previously described). The Commissioner is satisfied that the

disclosure of these personally-attributable comments and opinions would be likely to cause damage and distress to the individuals.

50. The Commissioner's decision is that, with regard to the information relating to adult individuals who are not senior staff, the rights and freedoms of those individuals outweigh the legitimate interests in the disclosure of the information.
51. She has therefore determined that this information has been correctly withheld under section 40(2) of the FOIA.
52. 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.

(3) Personal data of senior staff

53. The Commissioner has next considered certain information which relates to senior staff. Specifically, it comprises the explanations and opinions of one senior member of staff, who was in attendance at the meetings.
54. As indicated above, a key issue in considering whether personal data may lawfully be disclosed is whether the data subjects have a reasonable expectation that their information will not be disclosed, and whether there is a risk of damage and distress to the data subjects from disclosure.
55. The Commissioner notes that the redacted material covers this individual's thoughts and opinions on a range of matters. The Commissioner has considered the information, and whether there is a risk of damage and distress to the individual from its disclosure.
56. The Commissioner has distinguished between the individual's thoughts and opinions which are of a personal nature, and those which relate to general school matters.

Personal opinions

57. The Commissioner considers that, as a senior member of staff speaking at meetings of the governing body, this individual would have some expectation that comments made in the meetings might be made public. However, it is evident from the personal nature of some of the information that there was some expectation of confidentiality, at least as regards some of the minuted discussion.
58. The Commissioner also considers that disclosure of some of the opinions being expressed, since they are personal, would be likely to cause damage and distress to the data subject.

59. With regard to the opinions of a personal nature, the Commissioner is satisfied that the rights and freedoms of the individual outweigh the legitimate interests in the disclosure of the information, and disclosure would therefore be unlawful. She is therefore satisfied that this information, which she has identified in the separate cover letter to the Trust, was withheld correctly by the Trust under section 40(2) of the FOIA.

Opinions on general school matters

60. With regard to the senior staff member's explanations and opinions which relate to more general school matters, while she was evidently speaking fairly freely about the proposed restructuring, the Commissioner notes that, by the date that the Trust was considering its response to the request (July – September 2019), the relevant matters were resolved. The views also appear relatively uncontroversial, bearing in mind the likely concerns of a senior member of school staff at this point during any restructuring. The Commissioner therefore considers that there is a very minimal risk of damage and distress to this individual from the disclosure of this type of information.

61. As previously stated, the Commissioner considers that a senior staff member speaking at a meeting of a governing body where minutes are recorded, will in any case always have some expectation that their views may be made public.

62. Taking the above factors into account, she therefore considers that the legitimate interest in the disclosure of this information outweighs the individual's rights and freedoms.

63. Based on this, the disclosure of this information, which has been precisely identified to the Trust in the separate cover letter, would be lawful in accordance with Article 6(1)(f) of the GDPR. The Commissioner has gone on to consider whether it would also be fair and transparent, as required by principle (a).

Fairness and transparency

64. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).

65. In relation to fairness, the Commissioner considers that, if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

66. The requirement for transparency is met because as a public authority, the Trust is subject to the FOIA.

67. The Commissioner has therefore decided that, with regard to the information referred to above in paragraph 60 onwards and identified in the separate covering letter to the Trust, the Trust has failed to demonstrate that the exemption at section 40(2) is engaged.

68. She therefore orders this information to be disclosed.

Various names and initials not covered by the above analysis

69. The Commissioner has indicated to the Trust in the separate cover letter where she has determined it correctly redacted individuals' names and initials, and, conversely, where these may lawfully be disclosed. She has based her decision on all of the relevant factors discussed above and, in short, orders the disclosure of names and initials only where they identify and relate to senior (at the date of the request) members of Trust staff, since she has determined that this would be lawful, fair and transparent.

70. In cases where names and initials do not relate to senior Trust staff, she has determined that these were withheld correctly, since the rights and freedoms of those individuals outweighed the legitimate interest in disclosure, for the reasons considered above, and disclosure would not therefore have been lawful.

Right of appeal

71. 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

72. 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.
73. 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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