

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 August 2022

**Public Authority:** The Governing Body of Whitley Abbey Primary School

**Address:** Ashington Grove  
Whitley  
Coventry  
CV3 4DE

#### **Decision (including any steps ordered)**

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1. In a four part request, the complainant has requested information about apprentices at Whitley Abbey Primary School ('the School'). The School disclosed information relevant to two parts of the request and withheld information relevant to the remaining two parts under section 40(2) of FOIA as it considered it to be other people's personal data.
2. The Commissioner's decision is as follows:
  - The information requested in parts 2 and 4 of the requested information can be categorised as other people's personal data but disclosing it would not contravene the data protection legislation. Section 40(2) of FOIA is therefore not engaged.
3. The Commissioner requires the School to take the following step to ensure compliance with the legislation.
  - Disclose the specific information requested in parts 2 and 4 of the request.
4. The School 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**

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5. On 11 November 2021 the complainant wrote to the School and requested information in the following terms:

“We are writing to make an open government request for all the information to which we are entitled under the Freedom of Information Act 2000.

1. How many apprentices do you have within the school.
2. What classes or year groups are they based in or work with.
3. Please provide a copy of their job description.
4. Please provide all the details regarding what apprenticeship (course level and course title) they are on and who their learning provider is.

If this request is too wide or unclear, we would be grateful if you could contact us as we understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct us to it, with page references and URLs if necessary.

If the release of any of this information is prohibited on the grounds of breach of confidence, We ask that you supply us with copies of the confidentiality agreement and remind you that information should not be treated as confidential if such an agreement has not been signed.”

6. The School responded on 22 November 2021. It addressed parts 1 – 3 of the request. Regarding part 2, the School disclosed where in the School the apprentices were located – two in the classroom and one in the office. The School withheld information requested in part 4 under section 40(2) of FOIA.
7. Following an internal review the School wrote to the complainant on 1 December 2021. It maintained its reliance on section 40(2) with regard to part 4 and confirmed that it considered part 2 also engaged this exemption.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 14 March 2022 to complain about the way their request for information had been handled.

9. The Commissioner's investigation has focussed on whether the School is entitled to withhold the information being sought in parts 2 and 4 of the request under section 40(2) of FOIA.

## **Reasons for decision**

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### **Section 40 personal information**

10. 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.
11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 UK General Data Protection Regulation ('UK GDPR').
12. 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.
13. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

17. 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.
18. In its internal review the School said that while the request does not name a specific individual, it relates to the small number of apprentices working at the School (ie three individuals who can easily be identified). The School noted that the apprentices wear School ID in the workplace which identifies that they are apprentices. Due to the small number of apprentices in the school, the School advised that disclosing the requested information would reveal the class or year group the individual apprentice works in, individual apprentices' course level, title and their learning provider. The School considered this would amount to personal data because the information would relate directly to the identifiable apprentices.
19. In the circumstances of this case, the Commissioner agrees with the School and is satisfied that the information relates to the data subjects in this case, namely the apprentices. He is satisfied that this information both relates to and identifies the apprentices concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
20. 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.
21. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

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

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

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

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

25. Article 6(1) of the UK 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.
26. 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”<sup>2</sup>.
27. In considering the application of Article 6(1)(f) of the UK 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.

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<sup>2</sup> 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

28. 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**

29. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. 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.
30. In its internal review the School said it was unable to identify a legitimate interest in disclosing the requested information. It said that although the School aims to be accountable and transparent in its operations, it cannot meet such aims by disclosing individuals' qualifications or year group in which they work.
31. The complainant appears to have an interest in apprentices at the School and that is a valid personal interest for them to have. The Commissioner also considers that, as they are publicly funded, there is a wider legitimate interest in the School's use of apprenticeships. There is also a wider public interest in public authorities being open and transparent.

### **Is disclosure necessary?**

32. '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.
33. The School determined that disclosure was not necessary as it had not been able to identify a valid legitimate interest in disclosing the information.
34. The Commissioner considers that disclosure would be necessary to address the complainant's interest and the wider public interest in transparency.

## **Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms**

35. 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 subject 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.
36. 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 to the disclosure; and
  - the reasonable expectations of the individual.
37. 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 individuals' general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
39. The information being sought concerns individuals in their professional capacity, as apprentices. The information concerns first, the classes or year groups in which they are based. Given that the School has indicated that the apprentices are identifiable through ID badges, the classes or year groups with which they are working would be known in the School. The Commissioner does not consider it would cause the apprentices harm or distress if that information were known more widely. Similarly, the request for details about the courses the apprentices are on and their training providers is, in the Commissioner's view, sufficiently broad that disclosing it would not cause undue concern to those individuals. The Commissioner considers that this is information that the apprentices might reasonably expect to be disclosed, unlike, for example, their individual course results.
40. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore

considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

### **Fairness and transparency**

41. 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 the principle (a).
42. 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.
43. The requirement for transparency is met because as a public authority, The School is subject to FOIA.

### **The Commissioner's view**

44. In this instance, the Commissioner has decided that the School has failed to demonstrate that the exemption at section 40(2) is engaged.

## Right of appeal

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45. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**