

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2022

Public Authority: Office for Standards in Education,
Children's Services and Skills (Ofsted)

Address: Clive House
70 Petty France

London SW1H 9EX

Decision (including any steps ordered)

1. The complainant requested a copy of comments made on Parentview over a three-month period in relation to an Ofsted inspection at a named school. Ofsted relied on section 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that Ofsted is only entitled to rely on section 40(2) of FOIA to withhold some of the information falling within the scope of the request. Furthermore, that the information relating directly to the requester is exempt from disclosure under section 40(1) of FOIA.
3. The Commissioner requires Ofsted to take the following steps:
 - Disclose to the complainant the information in blue in the Confidential Annex.
4. Ofsted must take these steps 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 9 February 2022 the complainant made the following request:

“Please can i request a copy of the comments made on Parentview in the last 3 months, including in relation to the inspection carried out in January 2022, concerning Sacred Heart Voluntary Academy Hillsborough Sheffield.”

6. Ofsted responded on 16 February 2002 informing the complainant that the information was exempt under section 40 (third party personal data) because it could lead to the identification of the individuals who made the comments.

7. On 1 March 2022 the complainant requested an internal review. Ofsted provided an internal review response on 28 March 2022 in which it maintained its original position regarding section 40.

Scope of the case

8. The complainant contacted the Commissioner on 6 April 2022 to complain about the way their request for information had been handled.

9. The Commissioner commenced his investigation with a letter to the public authority on 9 August 2022 in which he asked a series of questions about the application of section 40 of FOIA and requested a copy of the withheld information.

10. The public authority responded on 2 September 2022 maintaining its position as regards the application of section 40(2) of FOIA and providing a copy of the withheld information.

11. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exemption at section 40(2) of FOIA. He will also consider whether section 40(1) of FOIA should be applied to one section of the information.

Reasons for decision

Section 40 personal information

12. Section 40(2) of 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.
13. 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 UK General Data Protection Regulation ("UK GDPR").
14. 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 FOIA cannot apply.
15. Secondly, 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?

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

"any information relating to an identified or identifiable living individual".

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

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

20. Ofsted provided the withheld information to the Commissioner for consideration. A key factor in this case is to determine whether individuals are identifiable from the withheld information.
21. Ofsted argued that, as comments are only sought from parents of the particular school being inspected, it will be obvious that the comments have been made by a particular and identifiable set of people:

“Each comment provided then will additionally provide a parent’s **unique** perception of the school. The school community would be able to recognise (and certainly speculate upon the identity of) many of the respondents, by reference to their opinion provided and the personal circumstances described in each of the comments. Each respondent themselves would certainly recognise their own comment if it was disclosed by Ofsted. Their personal circumstances will certainly be already known to the school and wider school community. Very often their opinions about the school may have also been communicated within parts of the community too. It is certain that many parents would be recognised/identified by reference to their comments in isolation.”

22. Ofsted pointed out:

“The Information Tribunal have previously commented about the identifiability of information gathered during an Ofsted inspection, when it does not contain the name of data subject. They said:

“18.The test for determining whether data have been sufficiently anonymised so that they cease to be personal data is, therefore rigorous. [...]. **Plainly, the Tribunal must have careful regard to the acute deductive powers of those familiar with the school and understandably curious as to the individuals referred to.** [...] We bear well in mind that a reasonable possibility of identification means that the relevant data are not anonymised.” EA/2015/0294”

23. Ofsted explained that a summary of the parents’ comments was already publicly available in its [inspection report](#).
24. As is explored in the ICO guidance on determining what is personal data, the Commissioner advises that it is necessary to consider whether individuals would be identifiable “by a determined person with a particular reason to want to identify individuals.” This is because disclosure ordered under FOIA is disclosure to the world at large and not just to the person making the request.

25. The ICO guidance on anonymisation² sets out that it is good practice to try to assess the likelihood of motivated individuals having and using the prior knowledge necessary to facilitate re-identification of statistical data.
26. The Commissioner is satisfied that the risk of identification is sufficient that some of the withheld information falls within the definition of "personal data" in section 3(2) of the DPA.
27. The Commissioner is satisfied that some of the withheld information both relates to, and could potentially identify, certain individuals in the context of a small school environment where parents are known to each other and the school. Therefore, some of the withheld information falls within the definition of "personal data" in section 3(2) of the DPA. **This is the information in red in the Confidential Annex (the "Personal Data").**
28. However, having considered the withheld information and the information available in the public domain, the Commissioner is of the view that some of the withheld information consists of generic comments from which individuals would not be identifiable. This is the information in blue in the Confidential Annex.
29. As regards the Personal Data, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure of the Personal Data would contravene any of the DP principles.
30. The most relevant DP principle in this case is principle (a). 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".
31. 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.
32. 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.

² <https://ico.org.uk/media/1061/anonymisation-code.pdf>

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

33. 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.

34. 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.

35. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

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:-

"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".

36. 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

37. 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. The interests may be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
38. It is clear that the complainant has a personal interest in the withheld information.
39. Ofsted acknowledges that there may be a legitimate public interest in transparency regarding Ofsted inspections and comments made by parents about a school.
40. The Commissioner recognises that there is a legitimate interest that would be served by disclosure of the Personal Data. He has therefore gone on to consider the necessity test.

Necessity

41. Ofsted argued that disclosure was not necessary to satisfy the legitimate interest in this case because it has already published a summary of parents' comments in its [inspection report](#) which is standard practice in order to protect parents and give them a safe space in which to express their views without fear of recriminations.
42. The ICO guidance⁴ on the necessity test advises that when considering the question of necessity, you must consider whether there is a pressing social need for the disclosure of the information in question.
43. The Commissioner considers that the legitimate interest of transparency regarding Ofsted inspections and parents' comments is met by Ofsted's published summary of parents' comments.

⁴ <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

44. Additionally, disclosure under FOIA is disclosure to the world at large and not just to the requester. It is equivalent to Ofsted publishing the Personal Data on its website.
45. As the Commissioner does not consider the disclosure of the Personal Data to be necessary, he has not gone on to consider the balancing test.

The Commissioner's view

46. In this instance, the Commissioner has decided that Ofsted was only entitled to withhold some of the information requested under section 40(2), by way of section 40(3A)(a), namely the Personal Data.
47. The Commissioner has decided that the information in blue in the Confidential Annex is not third-party personal data and should therefore be disclosed to the complainant.

Section 40(1) – personal data of the requester

48. Section 40(1) of FOIA provides an exemption from disclosure for any information which is the personal data of the person who has requested it. This is because a right of access to this information already exists via the Subject Access (SAR) provisions of the DPA and UK GDPR. Disclosure under SAR is disclosure of a person's data to them alone – rather than the disclosure to the world at large required by FOIA.
49. The Commissioner notes that, as the complainant is a parent at the school in question, if the complainant made a comment on Parentview and they could be identified from it, then that information would be the personal data of the complainant.
50. Section 40(1) is an absolute exemption, with no requirement to consider the complainant's wishes. Given his dual role as the regulator of data protection legislation, the Commissioner has a responsibility to prevent personal data being inadvertently disclosed under FOIA. He has therefore proactively applied section 40(1) of FOIA to the personal information of the complainant, to prevent any possibility that the information might be disclosed under FOIA.

Confidential Annex

51. In order to preserve a meaningful right of appeal for Ofsted (should it wish to exercise it) the Commissioner has been compelled to place

certain matters within a confidential annex. This will be provided to Ofsted only.

52. The Commissioner accepts that this may be frustrating to the complainant and would, as a matter of fairness, prefer to make his reasoning public wherever possible.
53. The confidential annex sets out the information that Ofcom must disclose.

Right of appeal

54. 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

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

55. 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.
56. 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

Michael Lea
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