

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2022

**Public Authority:** Department for Education (DfE)  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

### Decision (including any steps ordered)

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1. The complainant made a request for information regarding whether any disciplinary action had been taken in relation to DfE staff or politicians who attended an event during Covid restrictions. The DfE refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.
2. The Commissioner considers that the DfE was correct to apply section 40(5B)(a)(i) FOIA to refuse to confirm or deny whether the requested is held.
3. The Commissioner requires no steps to be taken.

### Request and response

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4. The complainant made the following information request to the DfE on 5 May 2022:

"I'd like to request the following information under the Freedom of Information Act:

1. Sue Gray's report into parties during lockdown set out details of the planning and holding of an event in the DfE canteen on December 10 2020. I would like to know whether any staff member or politician, or anyone else involved, faced disciplinary action as a result?

2. How many people were disciplined and what was this action?"
5. On 6 July 2022 the DfE responded to the request. It refused to confirm or deny whether the requested information was held under section 40(5B)(a)(i) FOIA.
6. The complainant asked the DfE to carry out an internal review. On 1 August 2022 the DfE provided the internal review, it refused to confirm or deny whether the requested information was held under section 40(5B)(a)(i) FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 1 August 2022 to complain about the way the request for information had been handled.
8. The Commissioner considered the scope of his investigation to be to determine if the DfE was correct to refuse to confirm or deny whether the requested information is held under section 40(5B)(a)(i) FOIA.

### **Reasons for decision**

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#### **Section 40 – personal information**

9. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
10. Therefore, for the DfE to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

11. Section 3(2) of the DPA 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. In this case the DfE has argued that confirming or denying whether the information is held would confirm or deny whether disciplinary action had been taken against DfE staff or politicians who are publicly known to have attended the event in question.
15. The Commissioner is satisfied that if the DfE confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. Hypothetically, if the DfE were to deny holding any such information this would disclose the fact that no disciplinary action had been taken and as some individuals are publicly known to have attended the event this would disclose the personal data of those individuals. The first criterion set out above is therefore met.
16. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the DfE from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
17. The Commissioner agrees that the most relevant data protection principle is principal (a).

**Would confirming whether or not the requested information is held contravene one of the data protection principles?**

18. Article 5(1)(a) UK GDPR states that:- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
19. 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so

would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

20. 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
21. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:- “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>1</sup>
22. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

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<sup>1</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 2018) 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”.

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

**(i) Legitimate interests**

24. In considering any legitimate interest(s) in confirming or denying whether the requested information is held 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.
25. The Commissioner considers that there is a legitimate interest in understanding whether disciplinary action has been taken in relation to DfE staff or politicians who attended an event during Covid restrictions even if that event was not considered to have reached the threshold for criminal investigation.

**(ii) Is confirming whether or not the requested information is held necessary?**

26. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
27. The Commissioner considers that it would be necessary to confirm or deny whether the requested information is held to meet the legitimate interests in this case.

**(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

28. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
29. 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.
30. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. 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 as individuals, and the purpose for which they provided their personal data.
31. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.
32. It is the DfE's view that an individual has a legitimate expectation that whether disciplinary action has been taken or not against them would not be disclosed into the public domain as it believes that to do so would be regarded as unfair to the individual.
33. In the Commissioner's opinion disclosure could result in an interference with the rights and freedoms of the data subject(s). The Commissioner considers that the data subject(s), would not have any expectation that

the DfE would confirm or deny the existence of specific disciplinary records in the public domain.

34. Whilst the Commissioner also considers that there is some legitimate interest in the public being informed of disciplinary action as a result of events held during Covid restrictions, the Commissioner is satisfied that confirmation or denial of the existence of disciplinary records into the public domain would cause damage and distress.
35. 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 confirmation or denial as to whether the requested information is held would not be lawful.
36. Given the above conclusion that confirming or denying whether the requested information is held would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.
37. In this instance, the Commissioner has decided that the DfE has demonstrated that the exemption at section 40(5B)(a)(i) FOIA applies to the request.

## Right of appeal

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38. 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](mailto:grc@Justice.gov.uk)

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

39. 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.
40. 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.....**

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