

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2022

Public Authority: Education Authority Northern Ireland
Address: 40 Academy Street
Belfast
BT1 2NQ

Decision (including any steps ordered)

1. The complainant requested from the Education Authority Northern Ireland (EANI) a copy of an investigation report in respect of an alleged injury to a child at a specified school on a specified date. Initially EANI refused the request citing section 40(2) of FOIA. However, following correspondence from the Information Commissioner asking EANI to review its decision, EANI altered its position and confirmed that it is refusing to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA.
2. The Commissioner's decision is that EANI is entitled to refuse to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA. He does not require any further action to be taken.

Request and response

3. On 5 July 2021 the complainant requested information in the following terms:

“Under the Freedom of Information Act I request a copy of the report issued circa [redacted], following an investigation by [redacted] into a report of an injury to a Severely Disabled non Verbal child at [redacted].

[redacted]

I appreciate that GDPR and confidentiality will result in redactions but I still request a copy of the report and its findings”.

4. EANI responded on 9 July 2021 and explained that the information requested was exempt under section 40(2) of FOIA (third party personal data) and section 41 of FOIA (actionable breach of confidence).
5. EANI provided an internal review response on 10 August 2021 in which it maintained its original position regarding section 40(2) of FOIA but did not refer to section 41 of FOIA .

Scope of the case

6. The complainant contacted the Commissioner on 16 August 2021 to complain about the way their request for information had been handled.
7. The Commissioner commenced his investigation with a letter to EANI on 16 February 2022.
8. EANI responded to the Commissioner on 25 February 2022 citing section 40(5) of FOIA as the applicable exemption.
9. The Commissioner considers the scope of his investigation to be to determine whether EANI is entitled, or not, to refuse to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA.

Reasons for decision

Section 40(5) - neither confirm nor deny

10. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
11. There are, however, exemptions from the duty to confirm or deny. It should be noted that when applying an exemption from the duty to confirm or deny, a public authority is not restricted to only considering the consequences of the actual response that it would be required to provide under s1(1)(a) of FOIA. For example, if it does not hold the information, the public authority is not limited to only considering what would be revealed by denying the information was held, it can also consider the consequences if it had to confirm it did hold the information and vice versa.
12. 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 (the "DP Principles") set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ("UK GDPR") to provide that confirmation or denial.
13. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.
14. Therefore, for EANI 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 DP Principles.

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

15. Section 3(2) of the Data Protection Act 2018 ("DPA") defines personal data as:

"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. EANI advised that if it were to confirm or deny whether the requested information is held it would be disclosing whether a child had been injured and also whether there had been an investigation. This confirmation or denial would therefore be disclosing personal data relating to a child and potentially other individuals to the world at large.
20. In the circumstances of this case, the Commissioner agrees that the requested information, if held, would be information which related to a child and potentially other individuals and would be information which would be used to inform decisions affecting them and have them as its main focus.
21. For the reasons set out above, the Commissioner is satisfied that if EANI confirmed whether or not it held the requested information this would result in the disclosure of third party personal data. The first criterion set out in paragraph 14 above is therefore met.
22. 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 EANI 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.

23. The Commissioner agrees with EANI that the most relevant DP Principle in this case is principle (a).

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

24. 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”.

25. 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, fair, and transparent.

26. 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

27. 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. One of the conditions in Article 6(1) must therefore be met before disclosure of the information – or as in this case confirming or denying whether the requested information is held - in response to the request would be considered lawful.

28. 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"¹.

29. 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.

30. 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

31. 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

¹ 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".

public interest, unrestricted disclosure to the public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. In its response to the Commissioner, EANI noted that:

"there may be a public interest in knowing whether there are safeguarding concerns in relation to children which required an investigation to be conducted. School staff work in a position of trust and are responsible for delivering appropriate care to special needs pupils in particular. If there are concerns over the care that is being provided, there may be a legitimate interest in knowing what those concerns are and how they are being addressed."

33. The Commissioner acknowledges, and therefore agrees, that there is a legitimate interest in knowing whether school staff are the subject of investigation. School staff hold a position of trust and are responsible for delivering appropriate care to their pupils. If there are concerns over the care that is being provided, there is a legitimate interest in knowing what those concerns are and how they are being addressed. He has therefore gone on to consider the necessity test.

Necessity

34. '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 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.

35. EANI does not consider the 'necessity test' has been met on this occasion. EANI has responsibility for investigating allegations against school staff in Northern Ireland. If sufficient evidence is received by EANI, a formal investigation is carried out which may result in disciplinary or criminal procedures or referral to other Government agencies. On conclusion of the investigation, the investigating officer will advise the person/s who made the allegation of the outcome of the exercise. EANI states on its website that the amount of detail provided will be very much dependent on the legal circumstances of the individual case and will be compliant with data protection legislation.

36. The Commissioner can see that EANI has a defined process to deal with any allegations received. Details of investigations are not published, and

this would seem the correct approach as many will not result in any action being taken and many will be unjustified or not upheld. For those cases that are justified or upheld and result in disciplinary or criminal proceedings, EANI decides on a case-by-case basis the amount of detail to be disclosed to the person/s who made the allegation.

37. The Commissioner considers the process for dealing with allegations does go some way to meeting the legitimate interests identified. However, in this case the Commissioner accepts that disclosure of investigation reports, if held, would meet the legitimate interest of safeguarding and accountability. He does not consider there are any alternative measures which make the confirmation or denial unnecessary. The Commissioner is therefore satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. The Commissioner agrees with EANI that disclosure of this type of information needs a balanced approach, considering the need for transparency and accountability and the rights of school staff and pupils.
38. Therefore, the next stage is to consider the balance between the legitimate interests identified and the individuals' fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial on the individuals concerned. For example, if the individuals concerned would not reasonably expect the public authority to confirm or deny whether the requested information is held in response to a FOIA request or if such confirmation or denial would cause unjustified harm.

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

39. In considering this balancing test, the Commissioner has considered the following factors:
 - the need to protect the interests and fundamental freedoms of data subjects when they are children;
 - the potential harm or distress that confirmation or denial may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the data subjects expressed concern regarding the confirmation or denial; and
 - the reasonable expectations of the data subjects.

40. In the Commissioner's view, a key issue is whether one of the data subjects - a child - had a reasonable expectation that the holding of their sensitive personal data would be confirmed or denied by EANI to the world at large. In the case of a child, it must be considered what the child might reasonably expect a public authority to do with their personal data in the context of their relationship with the public authority. These expectations can be shaped by factors such as an individual's general expectation of privacy, and the purpose for which their personal data was provided.
41. The Commissioner considers that when using 'legitimate interests' as a lawful basis for processing children's personal data, public authorities have a responsibility to protect them from risks that they may not fully appreciate and from consequences that they may not envisage. It is up to EANI, therefore, not the child, to think about these issues and to identify appropriate safeguards. It should be able to demonstrate that it has sufficiently protected the rights and fundamental freedoms of the child and that it has prioritised their interests when this is needed.
42. The concept of the 'best interests of the child' comes from Article 3 of the United Nations Convention on the Rights of the Child. Although it is not specifically referenced in the UK GDPR it is something that the Commissioner takes into account when considering compliance, and public authorities should consider when making decisions about the processing of children's personal data. It states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"
43. It is also important to consider whether confirmation or denial that any information is held would be likely to result in unwarranted damage or distress.
44. The Commissioner considers that any potential individuals concerned, and the child's family in particular, would not have any expectation that the holding of the sensitive personal data, in this context, would be confirmed or denied to the world at large. Such confirmation or denial could cause unnecessary distress to any potential individuals involved.

The Commissioner's view

45. 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 data subjects (particularly the

child) have a reasonable expectation that the holding of their sensitive personal data would not be confirmed or denied. Whilst any potential individuals other than the child may have less of an expectation of privacy due to their roles, because their personal data in this case is inextricably linked to that of the child and the child could potentially be identified, it would be distressing and intrusive to confirm or deny the holding of the personal data of any potential individuals involved. There is no compelling public interest reason to override 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 of whether the information is held would not be lawful.

46. Given the above conclusion that confirming or denying whether the information is held would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair or transparent.
47. In this instance, the Commissioner has decided that EANI was entitled to refuse to confirm or deny whether it held the information requested on the basis of section 40(5)(B) of the FOIA.

Right of appeal

48. 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

49. 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.
50. 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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