

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2013

Public Authority: The Governing Body of Brooklands Primary School

Address: Woodbourne Road
Sale
Cheshire
M33 3SY

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Brooklands Primary School ("the School") for anonymized statistical information on the progress of pupils at the School in reading. The School disclosed most of the information requested but provided a 'below 3' response where the number of pupils requested was 0, 1, or 2 so as to reduce the risk of individual pupils being identified. The School relied on the section 40(2) (personal information) exemption and argued that disclosure would contravene the first data protection principle. The Commissioner has investigated the complaint and found that most of the redacted information does not amount to personal data. The Commissioner did find that some information was personal data and that disclosure would contravene the first data protection principle and that therefore this information was exempt under section 40(2) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The School shall disclose to the complainant, in unredacted form, the information it holds falling within the scope of the request of 7 January 2013 with the following exceptions.
 - For table 1 the School may combine the information for 'number of pupils at 2a and below' for year 4.
 - The information for years 1 – 5 from table 6 shall not be disclosed.

3. The public authority 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

4. On 7 January 2013 the complainant made a request to Brooklands Primary School ("the School") for anonymized statistical information on the progress of pupils at the School in reading, with the information split between boys and girls. The complainant provided the School with a number of tables under the following headings which he asked to be populated by the school in its response.
 - i. Reading assessment per SIMS – Number of Pupils (in the current year 5) by sub-grade
 - ii. Number of pupils (in the current year 5) by sub-levels of progress between the autumn term of year 2 and the summer term of year 4
 - iii. Number of pupils (in the current year 5) by number of terms to make 3 sub-levels of progress in reading for those pupils assessed at level 2a or above in the autumn term of year 2
 - iv. Performance relative to reading target or expected level at the summer term of year 4
 - v. Target or expected result in the summer term of year 4 compared with the target or expected result in the summer term of year 5 – number of pupils (in the current year 5)
5. On 8 January 2013 the complainant also asked the School to provide the information in the following table.
 - vi. Number of pupils on the Special Educational Needs Register by year group from Nursery through to year 6 and how many pupils by school year are on SA, SA+ or have a statement of Educational Need.
6. The School responded to the request on 29 January 2012 when it provided the complainant with the information in the form requested. However some information was redacted and a figure of 'below 3' was given where the number of pupils in a particular field was 0, 1 or 2. To give just one example, in table 4 where the complainant asks for the number of pupils who missed their reading target by 2 sub-levels, a figure of 'below 3' was given. Information was withheld in this way from all 6 tables.

7. On 4 February 2013 the complainant contacted the School and asked it to complete an internal review of its decision to redact the specific number of pupils in a given field where this figure was below 3.
8. The School presented the findings of its internal review on 4 February 2013 when it explained that the information had been redacted so as to minimise the risk of identifying certain pupils. It said that the section 40(2) exemption applied as the information was personal data and disclosure would contravene the data protection principles.

Scope of the case

9. On 13 February 2013 the Commissioner received a complaint from the complainant about the way his request for information had been handled. The Commissioner considers the scope of his investigation to be to consider whether the School was correct to withhold the information where the number of pupils in a particular field was below 3 by relying on the section 40(2) exemption.
10. During the course of the investigation the Commissioner attempted to resolve the case informally. Whilst this was not possible the complainant did agree to one redaction. He agreed with the School that for table 1 the number of pupils who had received a reading assessment of between 'less than 1c' and '2a' could be combined and disclosed.

Reasons for decision

11. The School has confirmed that it is withholding the information under section 40(2) which provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case it has claimed that disclosure would contravene the first data protection principle which requires that personal data be processed fairly and lawfully.
12. Personal data is defined in the Data Protection Act 1998 as
"...data which relate to a living individual who can be identified-
(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

13. The first question to consider is whether the information amounts to personal data. The School has argued that the redacted statistics, whilst not naming pupils, could lead to an individual being identified if they were disclosed. It explained that it had given a figure of "below 3" because the small numbers involved, taken together with information which is already in the public domain could lead to an individual being identified. The School offered a number of examples to demonstrate how identification might occur.
14. The School explained that it has a relatively small number of pupils receiving support but that it also has several intervention groups which take place both inside and outside of the classroom. It said that the children are aware of this and therefore parents can also become aware of other pupils who are in the same group or who may work with a teaching assistant. Parents may actively ask their children about this and the School explained that some parents also help in classes. Therefore, it argues that this could lead to identification because parents, children and helpers can see in a classroom situation who is receiving additional help. Disclosure of the exact small numbers could, it argues, pinpoint pupils. In particular it says that it would be easy to identify a pupil in a particular SEN category. It suggests that the fact that the complainant requested that the data is split between girls and boys also makes it easier to identify an individual pupil.
15. As to levels of progress, the example given was that a parent of a pupil might know that their child has only made one level of progress and is being supported along with another child. If the number of pupils published is 2 the other child would be identified. Knowledge that pupils receive additional support or their grouping for some subjects could also lead to pupils being identified.
16. The complainant disagrees with the explanation given by the School. He suggests that, as regards the information in tables 1 – 5 the school has not offered any reasons for withholding the numbers of pupils who were achieving or exceeding reading targets as these pupils would not be in any support or intervention groups. For instance, table 3 only asks for information in relation to those pupils who would be achieving towards the upper end of the spectrum in reading and so would not be expected

to be in an intervention or support group. Furthermore, he argues that even where pupils have made less progress than expected or have a lower reading assessment it does not necessarily follow that these pupils would be receiving extra support or be in an intervention group as the School suggested. This is because, he argues, pupils rarely make linear progress in reading. Some pupils may have made substantial and rapid progress at the start of their school life (up to the end of key stage 1) but then may have reached a short term plateau. This would appear to be supported by the findings of research undertaken by the Department for Education.

"For many pupils, progress during Key Stages 2 and 3 is not linear and continuous; episodes of regression to an earlier level of attainment, or remaining at the same level for a period, are part of the norm."¹

17. For tables 4 and 5 specifically the complainant also argued that the School had failed to properly explain why the information should be withheld. These tables requested information on performance against targets and changes to targets. The complainant argues that since individual targets would not be available to either other pupils or to parents voluntarily assisting within the School it would not be possible to identify individual pupils. Again, the fact that an individual pupil may have missed a target does not necessarily mean that they will receive extra support or tuition.
18. The Commissioner accepts that disclosing anonymized information cannot always be completely risk free. Therefore the Commissioner works on the basis that the chance of an individual being identified should be reasonably likely for information to be classed as personal data under the Data Protection Act 1998. If the risk of an individual being identified is remote (even if it is hypothetically possible) then the Commissioner is likely to find that the information is not personal data. This is a finely balanced case and the Commissioner appreciates that the School, with the best intentions, has erred on the side of caution to avoid risking the disclosure of personal data. However, having considered the arguments of both parties he has found that the School has not sufficiently demonstrated how disclosure of the redacted figures would increase the likelihood of individuals being identified. The explanation and rationale given would appear to relate only to some of

¹ How do pupils progress during Key Stages 2 and 3?
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182413/DFE-RR096.pdf

the information that has been redacted. Even when there is an argument for withholding some of the information, the implication that a particular pupil who has missed a reading target or whose progress is less than expected would automatically be receiving extra support or intervention seems misplaced. Therefore the Commissioner has decided that on balance the likelihood of an individual pupil being identified is sufficiently remote for him to conclude that the information is not personal data.

19. For the information in table 6 the Commissioner considers that the likelihood of an individual being identified is greater, and that on balance this information can be said to be personal data. This is because it would be more reasonable to suppose that students with defined special educational needs are more likely to be receiving extra support or intervention and that therefore the School's arguments around potential identification carry more weight in relation to this particular set of data. Having satisfied himself that this information is personal data the Commissioner has gone on to consider whether disclosure of the information would contravene the first data protection principle.

First data protection principle

20. The first data protection principle requires that data be processed fairly and lawfully. In assessing whether disclosure would be unfair and thus constitute a breach of the first principle the Commissioner takes into account a number of factors such as:
 - The reasonable expectations of the individual about what will happen to their personal data
 - The possible consequences of disclosure
 - Whether consent has been obtained to disclose personal data
21. The School has said that in its view disclosure would be unfair because pupils and their parents would not expect the information to be disclosed in this manner and would not consent to this. It also suggested that there may be possible consequences of release, such as stigmatisation or bullying.
22. Whilst the Commissioner is sympathetic to the position of the School, he is also aware that the Department for Education routinely makes available information on the number of pupils with special educational needs within a school's cohort as part of the information it produces on

key stage 2 results and school census information.² From this information it is possible to calculate the number of pupils with different levels of special educational needs within year 6 of a given school. The fact that this information is already made available is particularly significant in considering the fairness of disclosure as it would indicate that there is limited harm in making this information available.

23. In the Commissioner's view the fact that information is already in the public domain is likely to mean that there would be a less reasonable expectation that this specific information would be withheld. Therefore, the Commissioner has decided that for the information in table 6 it would not be unfair to disclose the number of pupils with special educational needs for year 6 only. However the Commissioner has decided that for the remaining information the issue of fairness is balanced differently.
24. As information on other years is not published he takes the view that there would be a greater expectation that the information would not be disclosed in this way. As to the possible consequences of disclosure, the Commissioner accepts that disclosure could cause distress to the pupils and parents concerned and, as suggested by the School, could potentially lead to bullying or stigmatisation, especially since the pupils in other years would still be at the School whereas pupils in year 6 would have moved on to secondary education.
25. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public. In this case the Commissioner accepts that there is a legitimate interest in knowing information about the special educational needs provision at the school. However the Commissioner considers that this is satisfied by the level of detail already provided by the school. The Commissioner does not consider it necessary to disclose the exact numbers for each year group as requested by the complainant, beyond the number of pupils in year 6, and if there is any legitimate interest in this information being disclosed it is in his view outweighed by the public interest in protecting the rights and freedoms of the data subjects.

² http://www.education.gov.uk/schools/performance/download_data.html

26. As the Commissioner has found that disclosure of the information would be unfair it is not necessary to go on to consider whether disclosure would be unlawful or whether disclosure would meet one of the conditions in schedule 2 of the DPA 1998.
27. The Commissioner has decided that (with the exception of pupils in year 6) it would be unfair to disclose the information redacted from table 6 and so disclosure would contravene the first data protection principle. Consequently the Commissioner has decided that this information is exempt under section 40(2) of FOIA.

Right of appeal

28. 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: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. 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

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