

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2017

Public Authority: The Governing Body of Our Lady of Muswell RC Primary School

Address: Pages Lane
Muswell Hill
London
N10 1PS

Decision (including any steps ordered)

1. The complainant requested various categories of data relating to pay progression for eligible teachers from various schools in the Haringey area. The public authority (Our Lady of Muswell RC Primary School) in this case considered that to disclose the requested information would breach the 'third party personal data' (section 40(2)) exemption in FOIA. With the agreement of some of the other schools to which the request was directed though, it was considered appropriate to pool the data for these schools together in order to provide an aggregated response. The complainant, however, considers that the aggregated information does not satisfactorily answer her requests and has asked the Commissioner to consider the application of section 40(2) to the discrete set of data for the public authority.
2. The Commissioner has decided that section 40(2) of FOIA is engaged and therefore does not require any steps to be taken as a result of this notice.

Request and response

3. On 10 November 2015 the complainant made a series of requests to the public authority for data regarding pay progression decisions for eligible teachers. The full text of the requests is included in the appendix appended to this notice.

4. A response was provided on 22 January 2016. This advised that it was the view of a number of schools which had received the same requests that disclosure on a school-by-school basis would be unfair to the teachers to whom the data concerned and therefore the exemption in section 40(2) (third party personal data) of FOIA applied. The schools did conclude, however, that the privacy risk could be mitigated by providing the global figures for the schools as a collective and this information was provided.

Scope of the case

5. The complainant contacted the Commissioner to complain about the way her requests for information had been handled. In particular, the complainant considered that the specific pay progression data for the public authority could be disclosed under FOIA.

Reasons for decision

Scope of withheld information

6. In the aggregated response provided to the complainant it was confirmed that in respect of some of the categories of information requested no candidates met the description. The requests to which this applies are as follows:

Main scale progression

2. *(ii) Denied progression?*

3. *Of those that were denied progression, how many are in a Black or Minority Ethnic Group?*

4. *Of those that were denied progression, how many were female?*

Of those that were denied progression, how many were aged over 50 or over?

Progression to UPS 1

5. *Of those that were denied progression, how many were aged 50 or over?*

7. As the requests have therefore been answered, the Commissioner has removed them from the scope of this notice.

Section 40(2) – third party personal data

8. The public authority considers that each of the individual box markings for its pay progression data engages section 40(2) of FOIA. This provides an exemption to the public right to access recorded information where it is the personal data of a third party. The exemption will only apply where two principal conditions are met. Firstly, the information must constitute the personal data of a third party. Secondly, disclosure of that personal data would contravene a data protection principle. For the purposes of a disclosure under FOIA, it is likely to be the first data protection principle that is likely to be relevant. This requires the fair and lawful processing of personal data. The complainant has argued that disclosure of the raw data – ie without any other identifiers – would not permit the identification of an individual and, in any event, it would not be unfair to an individual to disclose the data.
9. Personal data is defined by section 1 of the Data Protection Act 1998 (DPA). This describes it as data which relate to a living individual, who can be identified from that data, or from that data and other information. In short, information will only be personal data where it 'relates to' an 'identifiable individual'.
10. In many cases it will not be a straightforward task to determine whether someone can be connected to numerical data. Even if the information itself does not contain direct identifiers, such as names, it may still be possible to match a person with the information by pulling together other pieces of data that are known about the individual.
11. At page 26 of her Anonymisation Code of Practice¹, the Commissioner states that data protection law is concerned with information which identifies an individual. This implies a degree of certainty that the information in question is about one person and not another. Consequently, identification involves more than making an educated guess that information is about someone. The possibility of making an educated guess in relation to the linking of data with an individual may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser.
12. This point is reinforced in the Commissioner's step-by-step guide 'Determining what is personal data'². At page eight, the guide explains

¹ <https://ico.org.uk/media/1061/anonymisation-code.pdf>

² <https://ico.org.uk/media/1554/determining-what-is-personal-data.pdf>

that the fact there is a very slight hypothetical possibility someone might be able to reconstruct data in such a way that the data subject is identified is not sufficient for the information to be personal data; rather identification must be reasonably likely.

13. As stated, it may be possible to link an individual to information, thus making it personal data, even if the information does not contain any obvious identifiers. This may happen where the information is pieced together with other bits of information in order to establish a data link. Consequently, when considering whether requested information is personal data, a public authority must factor in what surrounding contextual information could reasonably be obtained by someone motivated to identify an individual. In certain circumstances it may also be advisable for a public authority to bear in mind the prior knowledge an individual may have of the data subject to whom the information relates.
14. As a rule of thumb, the smaller the statistical pool the greater the chance that identification could take place. The risk of an identification taking place will also increase where all of the candidates within a pool meet a specified criterion. For example, although a third party may know that an individual is one of twenty teachers eligible for pay progression, he or she may not be able to discern whether the individual was successful where there is variation in the data pool (say, ten were successful and ten were not) without some other contextual information. This would not be the case, however, if all twenty teachers were successful. In that event, a disclosure would tell us something definitive about each of the teachers – namely, that they had been awarded a pay increase.
15. The Commissioner has had sight of the withheld data. In her view, the relatively few numbers of teachers involved and, or the way in which the box-markings are spread would allow an individual to be identified from the information by a third-party. In coming to this conclusion, the Commissioner has accepted that schools are often close-knit communities – the familiarity of staff and the contextual information this provides is likely to increase the ease with which a particular teacher could be picked out from the data. In some cases, for example, it would only require a third party – perhaps a fellow teacher – to know that a teacher was eligible for pay progression in order to deduce whether their application was successful. The Commissioner further considers that a properly motivated individual would be able to build on this basic level of information in order to get a wider understanding of the total number of teachers eligible for pay progression.
16. For these reasons, the Commissioner considers that the withheld information constitutes personal data as defined by the DPA. She has

therefore gone on to consider whether the information she has found to be personal data should be placed in the public domain through a disclosure under FOIA. This, as mentioned previously, involves a decision on whether disclosure would be in accordance with the first data protection principle and its requirement that personal data is processed fairly and lawfully. If these conditions are not satisfied, the exemption in section 40(2) of FOIA will apply.

17. The starting point when assessing whether the first principle is satisfied is the consideration of whether it would be fair to a data subject to disclose their personal data. To test whether it would be fair in the circumstances, the Commissioner will take into account the following competing interests –
 - A data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interest of the public in disclosure.
18. For the release of personal data to be permitted, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.
19. Under the Department for Education's School Teachers' Pay & Conditions Document (STPCD), a relevant education body must consider annually whether or not to increase the salary of teachers since the previous annual pay determination and, if so, to what salary within specified pay ranges. A decision on whether or not to award pay progression to a teacher on the Main and Upper Pay Ranges must be related to a teacher's performance. Every school governing board must have a written pay policy which sets out the criteria and standards for pay progression. The pay policy and the criteria and standards for progression are determined by the governing body but must be consistent with the STPCD's provisions.
20. At paragraph 42 of the guidance 'Requests for personal data about public authority employees'³, the Commissioner highlights that in recent

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

years public authorities have published an increasing amount of information on salaries of officials in the public sector. It is now expected that, at the very minimum, the pay band for a public sector employee should be published. This being said, the Commissioner considers that generally there will be a greater degree of sensitivity where information refers to any extent to the performance of an individual.

21. The Commissioner is of the view that, regardless of seniority, appraisal information will be regarded as personal to an individual because it represents a judgement on that individual's performance. Even though the data is limited in scope, in that it does not explain why a teacher was awarded a pay increase or not, the Commissioner considers that the fact the information is a performance measure would strengthen an expectation of confidentiality. Consequently, a disclosure is likely to be more intrusive than a disclosure of information that records the actions of an official in his or her role or, say, a salary band. For this reason, the Commissioner accepts that placing appraisal information in the public domain is likely to be distressing to those concerned.
22. The Commissioner accepts that there is a legitimate interest in knowing more about how a pay progression policy was being operated in practice by different schools within a particular area. The nature of the information though, and the likely consequences of disclosure, has ultimately led the Commissioner to decide that the strength of the arguments for upholding the rights of the teachers to privacy outweigh those that promote the legitimate interests of the public in disclosure. For this reason, the Commissioner has concluded that disclosure of the requested information would be unfair and therefore section 40(2) of FOIA applies.

Right of appeal

23. 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@hmcts.gsi.gov.uk

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

24. 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.
25. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Information Requests – 10 November 2015

Main scale progression

1. How many teachers at your school were eligible for progression on the main pay scale?
2. Of these how many were:
 - i) successful?
 - ii) denied progression?
 - iii) subject to another outcome?
3. Of those that were denied progression, how many are in a Black or Minority Ethnic group?
4. Of those that were denied progression, how many were female?
5. Of those that were denied progression how many were age 50 or over?

Progression to UPS1

1. How many teachers at your school were eligible for progression onto UPS1?
2. Of these how many were
 - i) successful?
 - ii) denied progression?
 - iii) subject to another outcome?
3. Of those that were denied progression, how many are in a Black or Minority Ethnic group?
4. Of those that were denied progression, how many were female?
5. Of those that were denied progression, how many were age 50 or over?

Progression within the Upper Pay Scale

1. How many teachers at your school were eligible for progression within the Upper Pay Scale?
2. Of these how many were:

- i) successful?
 - ii) denied progression?
 - iii) subject to another outcome?
3. Of those that were denied progression, how many are in a Black or Minority Ethnic group?
 4. Of those that were denied progression, how many were female?
 5. Of those that were denied progression, how many were age 50 or over?