

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 January 2019

**Public Authority:** Sussex Learning Trust  
**Address:** Broad Street  
Cuckfield  
Haywards Heath  
West Sussex  
RH17 5DP

#### **Decision (including any steps ordered)**

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1. The complainant has requested the trust to disclose the details of the bonus awarded to a member of staff in 2016/17. He asked to know who the bonus was awarded to, how much it was for and what it was for. The trust refused to disclose the information citing section 40(2) of the FOIA.
2. The Commissioner's decision is that the trust is entitled to rely on section 40(2) of the FOIA in this case. She therefore does not require any further action to be taken.

#### **Request and response**

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3. On 19 May 2018, the complainant wrote to the trust and requested information in the following terms:
  - "1. A full list of all job roles /job titles for all staff - teaching and support.
  2. For each job role, the salary / and or pay band
  3. For each job role, whether it is occupied by a man or a woman
  4. A list of all additional responsibilities that carry a pay enhancement, eg Head of year and the enhancement for it.
  5. For each additional responsibility, whether it is held by a man or a woman.
  6. A full copy of your Gender Pay Gap Report

7. A copy of your action plan to address the gender pay gap.
  8. A copy of your action plan to address "equality of opportunity" as mentioned in the CEO's webpage.
  9. Details of the one bonus awarded last year, ie who it was awarded to, how much it was for and what it was for.
  10. A copy of your policy for awarding bonuses
  11. Details of any benefits for staff , eg health care, car allowances and who has those benefits and the gender of those in receipt of them.
  12. A copy of your pay bands"
4. The trust responded on 6 June 2018. It provided some information and confirmed other elements of the request are not held. In relation to question 9 it refused to disclose the information citing section 40(2) of the FOIA.
  5. The complainant requested an internal review on 16 June 2018.
  6. The trust carried out an internal review and notified the complainant of its findings on 17 July 2018. It remained of the opinion that section 40(2) of the FOIA applied to question 9 of the request.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 30 July 2018 to complain about the way his request for information had been handled. He disagrees that section 40(2) of the FOIA applies to the information requested in question 9 of his request. He stated that he believes the public have a right to know who received the bonus, how much it was and how it was earned. Given the gender pay gap, he also stated that women also need to know whether it was awarded to a man or a woman and if it was awarded to a man how that man earned the bonus.

The Commissioner received no complaint about all other elements of the request. So the Commissioner's investigation has focussed on question 9 only and the trust's application of section 40(2) of the FOIA. As the request was received and dealt with after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018 applies.

## Reasons for decision

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8. Section 40(2) of the 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(3) or 40(4) is satisfied.
9. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where disclosure of information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').
10. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA 2018.

### *Is the information personal data?*

12. Section 3(2) of the DPA 2018 defines personal data as:-

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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. 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. The Commissioner has reviewed the withheld information and she is satisfied that it constitutes 'personal data' as set out in section 3(2) of the DPA 2018. It comprises of the name of the employee who received

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

the bonus and the amount which was paid. The employee can obviously be identified from their name. In terms of the amount and how it was earned, the Commissioner considers this information together with other information that may otherwise be available to the complainant would enable the employee to be identified also. The level of bonus whether small or large would point towards certain employees and the details of how they have earned that bonus (personal objectives, targets and so on and how they met them) would enable a motivated intruder to establish the identity of the data subject.

15. 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 would contravene any of the data protection principles.
16. The Commissioner considers that principle (a) is the most relevant in this case.

*Would disclosure contravene principle (a)?*

17. Article 5(1)(a) GDPR states that:-

*“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.*

18. Personal data is processed if it is disclosed in response to a FOIA request. This means that the information can only be disclosed if to do so would be lawful (i.e. would meet one of the lawful bases for processing listed in Article 6(1) GDPR), fair, and transparent.

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

19. Article 6(1) of the 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 bases for processing listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
20. The Commissioner considers that the lawful basis most applicable on the facts of this case would be that contained in Article 6(1)(f) 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, ...*<sup>2</sup>.

21. In considering the application of Article 6(1)(f) 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.

22. 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*

23. In considering any legitimate interest(s) in the disclosure of the requested information to the public under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sake as well as case specific interests.

24. Legitimate interests may range widely. They can be the requester’s own interests or the interests of third parties, commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

25. The complainant believes there is a legitimate interest in knowing who received the bonus and why both for the public and the other staff

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<sup>2</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) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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”.*

working at the trust. He stated that reference to the bonus was made in the trust's Gender Pay Gap Report and it is known that only one person received a bonus. Other members of staff and the wider public should be able to find out how that bonus was earned, how they can go about obtaining one for themselves and how much it was for.

26. The complainant also commented that given the gender pay cap within the trust and wider, women need to know if the bonus was awarded to man and if it was how that particular person went about earning it. He argued that there has also been recent publicity over the pay of male Chief Executives in Multi Academy Trusts (MAT). He stated that it is important this information is released if indeed the bonus was made to a senior male at the trust. He said that it is important in relation to MATs, given the publicity around 'fat cat' pay of leaders within MATs. The complainant argued that it is in the public interest to prevent gaps opening up between the lowest and highest paid staff in schools, particularly in the ongoing climate of budget cuts in schools. He finished by saying that the public needs to understand the circumstances around the bonus, who received it and how in order to challenge it if needs be.
27. The Commissioner accepts that it is legitimate for members of the public and more closely other members of staff in the trust to be able to scrutinise bonuses awarded to staff. In particular if these are awarded to senior officials, represent significant sums or have only been awarded to one or a select few within an organisation. Disclosure would promote openness and transparency and reveal the extent of the bonus awarded, to whom and why. It also involves the expenditure of public funds within an environment of ongoing constraint and budgetary cuts.

*Is disclosure necessary?*

28. '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 disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
29. The trust stated that all academy trusts are subject to significant transparency and oversight requirements for their performance and use of public money, which allows the public to understand how taxpayers' money is being spent and have assurance that it is in compliance with expected standards. It argued that these requirements provide, through legislation or regulation, for the public's legitimate interests in accessing the information.

30. It also stated that it discloses pay band data (to pay bands of £5,000) for senior employees in its published annual accounts, which are available on the trust's website and via Companies House.
31. The Commissioner considers the information publicly available does go some way to meeting the legitimate interests identified. As it has said it publishes pay band data (to pay bands of £5,000) for all senior employees. It is also noted that trusts do have oversight requirements for their performance and the use of public money. However, in the Commissioner's opinion this information and the compliance standards and requirements in place do not shed any light on how bonuses are awarded or explain or enable the public to scrutinise the bonus that was awarded to one employee within the trust for 2016/17.

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

32. It is necessary to balance the legitimate interests in disclosure against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
33. The trust has said that releasing the information requested would not constitute fair and lawful processing of personal information and would have a detrimental effect on the employee concerned. It argued that disclosure would place HR, financial and performance related information into the public domain for one employee. The trust stated that given the information solely relates to performance management considerations, such public discussion of year on year judgements of personal performance would be highly prejudicial to both the individual concerned and the trust's ability to effectively performance manage, motivate and reward the individual and others to ensure that the trust provides the best possible education to the young people it serves.
34. The trust referred to the Commissioner's guidance, in particular paragraph 51<sup>3</sup>, which states:

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

"Exceptional circumstances are needed to justify the disclosure of exact salaries when they are not routinely published. In such cases there may be additional public interest factors that outweigh any detriment to the individuals concerned. These exceptional circumstances could include situations where:

- there are current controversies or credible allegations;
- there is a lack of safeguards against corruption;
- normal procedures have not been followed;
- the individual in question is paid significantly more than the usual salary for their post; or
- the individual or individuals concerned have significant control over setting their own or others' salaries."

35. It confirmed that there are no exceptional circumstances or compelling public interest reasons which override the individual's reasonable expectations that the trust will process their personal data in accordance with the GDPR/DPA and so section 40 applies.
  36. The Commissioner considers the individual concerned will hold the reasonable expectation that any bonus information will remain private and confidential. Bonus information is reflective of one's personal performance and much can be deduced from that information, particularly if the information is disclosed year on year. It would enable a motivated intruder to evaluate year on year what they have received, if any and from that judge the personal performance in their role. The Commissioner considers the disclosure of exact salary information and bonus information is more intrusive than the disclosure of salary information within specified bands. It relates to an individual's personal performance, disclosure of which could cause distress, upset and in some situations negative effects on their careers or prejudice their ability to negotiate the best possible terms and conditions with future employers.
  37. The Commissioner notes the legitimate interests in the disclosure of this information and that disclosure would enable those interested in the bonus awarded by the trust to scrutinise, debate and challenge it if needs be. However, the Commissioner does not consider these are compelling enough to outweigh the rights and freedoms of the individual
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concerned in this case considering the distress this may cause and the more personal nature of the requested information. The Commissioner's guidance refers to there having to be exceptional circumstances in a given case to warrant disclosure and overriding of the rights and freedoms of the data subject. Although the complainant has concerns over the gender pay gap and alleged large bonuses being awarded to Chief Executives of MATs, the Commissioner has seen no firm evidence to support this only that which has been reported in the press. And, if indeed there are any issues of this nature, these are wider issues affecting the public sector as a whole rather than an issue or concern relating to this trust and its staff alone.

38. For the above reasons, the Commissioner is satisfied that disclosure of the withheld information would not therefore be lawful.
39. Given the conclusion the Commissioner has reached on lawfulness, she is satisfied that there is no requirement to go on to consider separately whether or not disclosure would be fair and transparent.
40. The Commissioner is satisfied that the trust is entitled to rely on section 40(2) of the FOIA, by way of section 40(3A)(a) of the FOIA.

## **Right of appeal**

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41. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

42. 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.
43. 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**

**Mrs Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**