

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2020

**Public authority:** Education Authority Northern Ireland

**Address:** 1 Hospital Road  
Omagh  
BT79 0AW

#### Decision (including any steps ordered)

---

1. The complainant has requested information from the EANI regarding placement of statemented children in schools. The EANI refused to disclose some of the requested information, citing section 40(2) of the FOIA as a basis for non-disclosure. It refused to disclose the remainder, citing section 12(1) of the FOIA.
2. The Commissioner's decision is that the EANI has correctly applied sections 12(1) and 40(2) of the FOIA to the requested information.
3. The Commissioner requires no steps to be taken.

#### Request and response

---

4. On 18 June 2019 the complainant made a request for information in the following terms: -
  1. "What consideration was given to the letter from [name redacted] of 17 May in respect of the placement of three children in Form 1 in [named school] in September 2019? Please supply records of all relevant discussions. For each child, please indicate why the Education Authority believes that [named school] is compatible with the three statutory criteria for the placement of a child with a statement in this particular setting.

2. In her letter of 17 May, [name redacted] has indicated how our Learning Support Suite will not be able to function properly with the continuing rise in pupils with Stage 5 statements we have been directed to accept. What consideration has been given to the needs of other pupils in your deliberations?
3. In how many cases per Northern Ireland grammar school, and in which schools, has an Education Authority representative directed a school to accept pupils in 2017, 2018 and 2019 after receiving written communication from the school in question indicating the unsuitability of the educational provision at that school for the pupil(s) in question?
4. In addition to concerns relating to the educational and social development of the three pupils for whom direction letters have been issued and for the wellbeing of other pupils, [name redacted] has drawn your attention to safety concerns. What additional resources will be made available to accommodate these safety concerns and on whom will legal responsibility rest if resources are not made available in respect of a pupil for whom a direction letter has been issued and whom the school does not wish to accept due to safety concerns?"
5. The EANI responded to the complainant's request on 1 August 2019, citing section 40(2) of the Freedom of Information 2000 in respect of parts 1, 2 and 4 of the complainant's request and section 12 of that Act (the FOIA) in respect of part 3 of the complainant's request.
6. The complainant sought an internal review of the EANI's response in respect of parts 2-4 of his request. He accepted the EANI's data protection concerns in respect of part 1 but not in respect of parts 2 and 4. He also offered to refine part 3 of his request to six specified schools. The result of that internal review was sent to the complainant on 16 December 2019. The reviewer upheld the original decision to apply section 40(2) to parts 2 and 4 of his request. The EANI also wrote to the complainant on 23 December 2019 inviting him to further narrow his request in respect of part 3.
7. The Commissioner wrote to the EANI on 22 April 2020. One of the questions she asked was whether the complainant had further narrowed his request. The EANI stated that it had written to the complainant again asking him to narrow his request by 10 January 2020, otherwise the matter in respect of part 3 of the request would be

closed. The complainant did not respond by 10 January, so the EANI considered that part of the matter closed.

### **Scope of the case**

8. The complainant contacted the Commissioner on 12 February 2020 to complain about the way in which the EANI had handled his request for information.
9. The Commissioner has considered the EANI's handling of the complainant's request, in particular its application of the exemption as set out at section 40 (2) of the FOIA and its application of section 12(1) of the FOIA.

### **Reasons for decision**

---

#### **Section 40-personal information**

10. 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 requestor and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

12. 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 DP principles.

#### ***Is the information personal data?***

13. Section 3(2) of the DPA defines personal data as:

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

15. 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.

16. 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.
17. The EANI has informed the Commissioner that the requested information in parts 1, 2 and 4 of the complainant's request forms part of the EANI's case files regarding children with special educational needs and the individual children may be identifiable either directly from the information, or from the information when combined with other available information.
18. In the circumstances of this case, the Commissioner is satisfied that the withheld information relates to an identifiable individual. The requested information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
20. The most relevant data protection principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

21. Article 5(1)(a) of the GDPR states that:

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

22. In the case of a FOI request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

24. 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*” lawful bases for processing listed in the Article applies.

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*“processing is necessary for the purpose 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”.*

26. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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 disclosure;

**iii. Balancing test**

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

27. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii).

*Legitimate interests*

28. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requestor’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 requestor 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.

29. In this case the complainant has an interest in the requested information because it directly impacts upon the school on behalf of which the complainant has made the request. The Commissioner accepts that this is a legitimate interest.
30. In addition, the Commissioner considers that there are wider legitimate interests in the disclosure of the withheld information, as it would allow the public to see the decision-making processes involved in the placement within post-primary education of statemented children.

*Is disclosure necessary?*

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner is cognisant that disclosure under the FOIA is disclosure to the world at large. It is the equivalent of the EANI publishing the information on its website. When considering the necessity test, she is not therefore considering whether providing the information *to the requestor* is necessary to achieve the legitimate interest, but whether it is necessary to *publish* the information.
33. As set out above, the Commissioner recognises the legitimate interest in the public being informed of the decision-making processes of the EANI in circumstances involving statemented pupils. The question is therefore whether it is necessary for the EANI to disclose the requested information in order to meet the legitimate interest.
34. The EANI has informed the Commissioner that there is another more appropriate way to address the issues raised that would interfere less with the privacy of the children. The EANI stated in its original response to the request that the queries raised should be more appropriately dealt with through correspondence and/or meetings between the relevant EA service and the school in the normal course of business. The EANI has confirmed to the Commissioner that following the original FOI response, the relevant EA service did meet with the school in this respect (in September 2019).
35. The EANI also pointed out that its internal review response to the complainant highlighted to the applicant the publicly available information which falls within the scope of this request and where such

information can be accessed. The EANI confirmed to the complainant that it is unable to comment on individual pupils or cases in response to a FOI request.

36. As there is a more appropriate way to address the issues raised, that does not necessitate disclosure into the public domain of the requested information, the Commissioner is satisfied that disclosure is not necessary in order to meet the legitimate interests identified.

***Is any of the information special category data?***

37. Information relating to special category data is given special status in the GDPR.

38. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

39. Having considered the wording of the request and the submissions of the EANI, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the information includes data regarding the special educational needs of individual children, which constitutes data concerning health.

40. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

41. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

42. The Commissioner is aware that there is clearly a recognised and strong expectation that the personal information contained within case files relating to the statutory assessment of special educational needs will remain private. The EANI has stated that it would therefore be wholly inappropriate for it to seek explicit consent to any special category data being disclosed to a requestor under the FOIA. The Commissioner has also seen no indication that the data has been made manifestly public by the data subjects.



43. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

## **Section 12 – cost of compliance exceeds the appropriate limit**

44. Section 12(1) of the FOIA states that:

*“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”*

45. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- Determining whether it holds the information
  - Locating the information, or a document containing it
  - Retrieving the information, or a document containing it
  - Extracting the information from a document containing it
46. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be *‘sensible, realistic and supported by cogent evidence.’*
47. The EANI has informed the Commissioner that, as the request specifically relates to cases where a school has indicated the ‘unsuitability of the educational provision of that school for the pupil(s) in question’ it would not be in a position to confirm if that information is held without carrying out a thorough search of all potentially relevant records.



48. The EANI provided an estimate of two hours per school, per school year as a conservative estimate to cover the time needed in determining whether the information is held, locating the information, retrieving the information and extracting the relevant information from within each individual file.
49. The EANI informed the Commissioner that the information requested is not held centrally. To retrieve and compile the information requested would require a member of staff to search through individual hard copy pupil files. The EANI also factored in children transferring to the named schools in all school year groups and provided, as per paragraph 50 below, a more detailed breakdown of how it arrived at its estimate.
50. The EANI estimated that the number of records which may hold relevant information was 83. As part 3 of the request spans 3 School years, the files were divided accordingly to provide an average, this equates to 27.6 files per school year. Further broken down by the number of schools referred to in the enquiry (6), this equates to an average of 4.6 files per school per school year. The EANI made a conservative estimate of 26 minutes per file in order to retrieve the file, locate the relevant information therein, confirm if the information requested is held and extract that information. Having accounted for all the relevant factors the EANI arrived at an estimate of two hours per school, per school year, which works out as below:
  - 26 minutes per file X 4.6 (average number of files per school, per year) = approximately 2 hours per school, per year
  - (X 3 school years = approximately 6 hours per school)
  - (X 6 schools = a total time estimate of approximately 36 hours)
51. Based upon the EANI's submissions, the Commissioner accepts that it would exceed the cost limit to comply with the requests and therefore section 12 was correctly engaged in this case.

## **Section 16 – Advice and Assistance**

52. Under section 16 of the FOIA the EANI is obliged to provide the complainant with advice and assistance to help enable the complainant to refine the request to fall within the cost limit, or explain why this would not be possible.
53. The EANI confirmed that, on the basis of its cost estimate, the complainant was contacted twice by its Information Governance team and asked to further refine his request. The second letter sent to the complainant in this respect confirmed that this part of his request would

be closed if he did not further refine it by 10<sup>th</sup> January 2020. No further response was received from the complainant and part 3 of his information request was therefore closed.

54. As the EANI has provided advice and assistance in this case, by asking the complainant to refine his request, it has complied with its obligations under section 16 of the FOIA.

## Right of appeal

---

55. 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)

56. 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.
57. 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** .....

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