

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2020

Public Authority: The Governing Body of St Augustine's School

Address: Sandybed Lane
Scarborough
North Yorkshire
YO12 5LH

Decision (including any steps ordered)

1. The complainant has requested information about complaints and staff qualifications. St Augustine's School ('the School') disclosed information relevant to one part of the request. It relied on section 12(1) of the FOIA (cost exceeds the appropriate limit) to refuse to comply with two parts and withheld information requested in the remaining five parts of the request under section 40(2) of the FOIA (personal data). The complainant disputed the School's reliance on section 12(1) and section 40(2). During the course of the Commissioner's investigation the School withdrew its reliance on section 40(2) with regard to two parts of the request and released this information to the complainant.
2. The Commissioner's decision is as follows:
 - The School is entitled to rely on section 12(1) of the FOIA to refuse to comply with the request for information about informal complaints in parts 1 and 2 of the complainant's request, as it would exceed the appropriate cost limit to do so. The Commissioner finds that no breach of section 16(1) occurred (advice and assistance).
 - The information requested in parts 6, 7 and 8 of the request is the personal data of third persons and is exempt from disclosure under section 40(2) of the FOIA.

- The School breached section 10(1) of the FOIA with regard to parts 4 and 5 of the request as it did not communicate the information it holds to the complainant within 20 working days of receiving the request.
3. The Commissioner does not require the School to take any remedial steps.

Request and response

4. On 27 November 2019 the complainant wrote to the School and requested information in the following terms:

"[1] The number of informal/formal complaints received by the school from, and including, 2016. Please provide the number of informal/formal complaints for each year.

[2] The number of complaints received at the informal stage from, and including, 2016.

[3] The number of complaints received at the first formal stage from, and including, 2016.

[4] The number of complaints received at the second formal stage from, and including, 2016.

[5] The number of complaints received at the third formal stage from, and including, 2016.

[6] The staff members who have been complained about from, and including, 2016.

Please can you also confirm whether or not the School holds documents with information about the complaints it receives.

Furthermore, please can the School confirm whether or not information in those documents may be redacted and sent under the FOIA.

Additionally, can the School provide me with the following information pertaining to the recruitment of staff:

[7] Firstly, the qualifications of the School's SENCo when they were first employed by the School.

[8] Secondly, the current qualifications of the School's SENCo."

5. The School provided the complainant with a response and a refusal notice on 18 December 2019. The School released the information requested in part 3 of the request. It relied on section 12(1) of the FOIA to refuse to comply with parts 1 and 2 of the request and refused

to disclose the information it holds that falls within the scope of parts 4, 5, 6, 7 and 8 under section 40(2) of the FOIA.

6. The complainant requested an internal review on 11 January 2020 and the School provided one on 23 January 2020. The review appears only to address the School's reliance on section 40(2); it upheld its position with regard to that exemption.
7. In the course of the Commissioner's investigation the School withdrew its reliance on section 40(2) with regard to parts 4 and 5 of the request. It communicated the information requested in these parts to the complainant on 17 November 2020.

Scope of the case

8. The complainant first contacted the Commissioner on 18 December 2019 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the School can rely on section 12(1) of the FOIA to refuse to comply with parts 1 and 2 of the request of 27 November 2019, and whether it has breached section 16(1) with regard to those parts. Technically, if a public authority applies section 12 to one part of a multi-part request, it is not obliged to comply with any part of that request. Because if it exceeds the cost limit to comply with one part of the request, the cost limit must have been exceeded in relation to the remaining parts of the request. However, in this case the School has considered other parts of the complainant's request and applied section 40(2) to those parts. The Commissioner has therefore also considered whether the information requested in parts 6, 7, and 8 of the request can be categorised as personal data that can be withheld under section 40(2) of the FOIA.
10. Finally, the Commissioner has considered the timeliness of the School's response to parts 4 and 5 of the request.

Reasons for decision

Section 12 – cost exceeds the appropriate limit

11. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the

information communicated to him or her if it is held and is not exempt information.

12. Section 12(1) of the FOIA says that a public authority is not obliged to comply with section 1(1) if the authority estimates that the cost of doing so would exceed the appropriate limit.
13. Under section 12(2), a public authority is not obliged to comply with section 1(1)(a) if complying with that paragraph alone would exceed the appropriate cost limit.
14. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to the School. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - determine whether it holds the information
 - locate the information, or a document which may contain the information
 - retrieve the information, or a document which may contain the information, and
 - extract the information from a document containing it.
15. Where a public authority claims that section 12(1) of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the applicant refine the request so that it can be dealt with under the appropriate limit, in line with section 16(1) of the FOIA.
16. In its submission to the Commissioner the School has confirmed that it is relying on section 12(2) with regard to the request for information about informal requests in parts 1 and 2 of the request. Part 1 is for the number of "*informal/formal*" complaints from 2016, with the number of such complaints for each year. Part 2 of the request is for the number of complaints received "*at the informal stage*" from 2016.
17. The School has confirmed that to provide information about informal complaints would necessitate reviewing student files from 2016 to 2019. The School says this would be a complex process. This is because while it has historically kept a central log of formal complaints it has not kept a central log of informal complaints. The School notes that prior to July 2019 it was a local authority maintained school and records were not necessarily held digitally.

18. In order to provide information on any informal complaints the School says it would need to review every single student record over the course of three years. Based on its current student numbers, this would be a minimum of 910 student files (the number of students at any one time is 650 plus two additional year groups covering the three years: $650 + 130 \times 2 = 910$ files), with up to five years of data relating to each student.
19. The School has estimated that it would take an average of 45 minutes to check each student file. With a minimum of 910 files in the frame, this would equate to more than 680 hours of administrative time and a cost of more than £17,000.
20. The School has based its 45 minute estimate on the time taken to: retrieve each file from the archive; carry out a detailed review of the file for the period of five years; and catalogue any relevant information found. A sampling exercise has, in effect, been carried out from the School's previous experience of the time taken to review a student's file.
21. According to the School, the time it takes to carry out a review is often more than several hours in the case of complex and detailed files. In those cases, the review is usually carried out by a senior member of staff such as the Special Educational Needs Co-ordinator (SENCo) who knows what they are looking for.
22. The School has also explained that historical data is held in a manual file. However, there are also digital files that would need to be considered as part of this process and, to make sure that its response was accurate, it would need to carry out a review of these digital files. The School's estimate above is based solely on an inspection of the manual files and does not take account of the further time to review its digital records.
23. The School has referred to section 12(2) in its submission to the Commissioner. Section 12(2) can be relied on in cases where it would exceed the appropriate limit to even confirm or deny that requested information is held. In this case, the School confirmed in its refusal notice that it does hold information on informal complaints ie that some student files will contain information on such complaints. The issue here is that the School considers it would exceed the appropriate limit to provide information on the *number* of informal complaints it holds – that is a section 12(1) matter.
24. The complainant has told the Commissioner that other schools to which he has submitted his request have provided him with the information he has requested. That may well be the case, but the Commissioner can only consider the circumstances as they apply to this school. The

Commissioner considers that the School's estimate is credible, given the time period that the request covers, the way the School holds such information, and the number of student files covered by the request. The Commissioner sees no reason to doubt the School's estimate of 45 minutes per file but even if the review process only took 15 minutes per one (manual) student file, it would still take over 200 hours to review over 900 manual files – well in excess of the 18 hour time limit. As such, the Commissioner finds that the School can rely on section 12(1) of the FOIA to refuse to comply with parts 1 and 2 of the complainant's request.

Section 16 – duty to provide advice and assistance

25. Under section 16(1) of the FOIA, a public authority has a duty to provide an applicant with advice and assistance, so far as it would be reasonable to expect the authority to do so.
26. The Commissioner's view is that, where a public authority refuses a request under section 12 of FOIA, section 16(1) creates an obligation to provide advice and assistance on how the scope of the request could be refined or reduced to avoid exceeding the appropriate limit.
27. The Commissioner's published guidance on section 12 advises that where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:
 - either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requestor to make a refined request.
28. It appears to the Commissioner, from the School's submission to her, that it has misunderstood the obligation under section 16 somewhat. She does not doubt that the School sought to help the complainant more widely. However, she must consider whether or not the School breached section 16(1) with regard to its application of section 12 to the specific request in question – as discussed above.
29. In its refusal of parts 1 and 2 of the complainant's request of 18 December 2019 the School did advise the complainant that it was not able to provide any information at all about informal complaints. As such it satisfied the minimum requirement of section 16 and, in the circumstances, the Commissioner finds that that was adequate. Even if

the School had suggested to the complainant that he could, for example, refine the request to cover only one year, complying with that refined request would still have taken over 200 hours and exceeded the cost limit.

Section 40 – personal data

30. 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(3A), 40(3B) or 40(4A) is satisfied.
31. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
32. 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.
33. 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?

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

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

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
36. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

37. 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.
38. The School has applied section 40(2) to parts 6, 7 and 8 of the complainant's request. Part 6 concerns the names of staff members who have been complained about since 2016. Parts 7 and 8 concern the qualifications of the School's SENCo; at the time they were employed at the School and at the date of the request.
39. The Commissioner is satisfied that the information requested in parts 6, 7 and 8 can be categorised as the personal data of third persons. It would be the personal data of any staff who had been complained about, and the School's SENCo. Because the complainant has asked for the name(s) of any staff member who has been subject to a complaint it is clear that those staff members could be identified. Similarly, it would be clear who the School's SENCo was; they could be identified, their qualifications relate to them and therefore information about their qualifications is their personal data.
40. In the circumstances of this case, having considered the information being withheld in parts 6, 7 and 8 the Commissioner is satisfied that that information relates to third persons – any staff concerned and the School's SENCo. She is satisfied that this information both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
41. 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 DP principles.
42. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

43. 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".

44. In the case of an 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 if to do so would be lawful, fair and transparent.
45. 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

46. 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.

47. 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"*².

48. 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:

Legitimate interest test: Whether a legitimate interest is being pursued in the request for information

Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question

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

49. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

² 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".

Legitimate interests

50. 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 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.
51. The complainant has not provided the Commissioner with any reasons as to why he has requested the information in question or what his interest in it is. There is, however, the general principle of accountability and transparency for their own sake.

Is disclosure necessary?

52. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable 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.
53. In the Commissioner's view there is minimal wider public interest in which, if any, of the School's staff have been subject to a complaint and the School SENCo's qualifications. The complainant has not put forward any broader public interest that there may be in this information and appears to be pursuing a private concern. In the absence of any compelling legitimate interests being pursued the Commissioner finds that disclosing the information is not necessary. The general principle of accountability and transparency has been met to a sufficient degree through the other information the School has released in response to the complainant's request.
54. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

55. The Commissioner has therefore decided that the School was entitled to withhold the information requested in parts 6, 7 and 8 of the request under section 40(2), by way of section 40(3A)(a).

Section 10 – time for compliance

56. Under section 10(1) of the FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
57. The complainant submitted his request on 27 November 2019. The School did not communicate the information it holds that is relevant to parts 4 and 5 of the request until 17 November 2020. The School therefore breached section 10(1) with regard to those parts.

Right of appeal

58. 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

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

59. 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.
60. 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

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