

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2021

Public Authority: The Governing Body of St Ralph Sherwin Catholic Multi-Academy Trust

Address: Third Floor, St Katherine's House
Mansfield Road
Derby
DE1 3TQ

Decision (including any steps ordered)

1. The complainant has requested safeguarding-related information and a risk assessment document. The Governing Body of St Ralph Sherwin Catholic Multi-Academy Trust ('the Trust') advised it would not release some of the information, provided a little and denied holding any further relevant information.
2. The Commissioner's decision is that, on the balance of probabilities, the Trust has identified all the relevant information it holds within scope of parts 2 and 3 of the request and has therefore complied with its duty under section 1(1) of the FOIA.
3. In respect of part 1 of the request, instead of suggesting it was withholding personal data under section 40(2) of the FOIA, the Trust should have relied on section 40(5) to neither confirm nor deny holding relevant information and the Commissioner has therefore applied section 40(5) of the FOIA to this part herself, proactively.
4. The Commissioner does not require the Trust to take any further steps.

Request and response

5. On 7 July 2019, the complainant submitted a request to the Trust in the following terms:

"New - Freedom of information request.

I am writing to request that you send to me the information detailed below from your organisation.

Unless otherwise stated, the requests below are for the period January 2014 to July 7th 2019.

In all instances and given confidentiality it will be perfectly in order to provide the information anonymously for example by redacting the names of firms or individuals. In all instances, copies of the originals may be provided.

1. Any documentation that the school has produced or received concerning and ONLY with regard to safeguarding concerning [name redacted] - former employee - and, in addition, those records for the [name redacted] family.

2. Safueguarding [sic] training records for all staff from January 2004 until March 2017.

3. The generic risk assessment covering out of school sporting events from September 2016."

6. The Trust initially refused this request (and another submitted a few days earlier) as vexatious. The complainant complained to the Commissioner who found that neither request was vexatious, and in November 2020 she ordered the Trust to provide fresh responses to both requests.
7. On 18 December 2020 the Trust issued a fresh response to this request. With regard to part 1 of the request, it said it would not release information about a safeguarding case. In response to part 2 the Trust advised that safeguarding training had taken place for all staff on 14 October 2014. The Trust advised that it does not hold the information requested in part 3.
8. The complainant sought an internal review on 5 January 2021 and the Trust provided one on 9 February 2021. This correspondence appears to cover this request and other requests the Trust had received from the complainant. The Trust confirmed that it considered its handling of the requests to have been satisfactory.

Scope of the case

9. The complainant contacted the Commissioner on 17 February 2021 to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to determine whether the Trust holds any further recorded information within the scope of parts 2 and 3 of the request. However, she will also explain why she considers that the Trust should have neither confirmed nor denied holding information within the scope of part 1.

Reasons for decision

Section 1 – held/not held

11. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

14. The complainant has noted that he had been the subject of a Teaching Regulation Agency (TRA) panel outcome ('the Panel') which had found against him. He argued that his lack of access to this information had undermined his ability to present his defence. He was in the process of appealing the decision and therefore required the information in order to present his case.
15. In its submission to the Commissioner the Trust confirmed that, despite repeated requests from the complainant and repeated requests to carry out searches, it did not hold the requested information.
16. In respect of part 2 of the request, for staff safeguarding training records, the Trust had been able to confirm only that all staff had received safeguarding training on 14 October 2014. However, the Trust says that records were not formally kept for safeguarding training. It says that staff were invited to respond to emails asking if they had read key documents and that there is no evidence that this was formally recorded. Furthermore, although expected by law, personnel files were not kept up-to-date with key information, including safeguarding details. Although it is an obligation of the headteacher to keep a central log of who has received safeguarding training, those logs had not been found within the school concerned, or Trust documents. An Ofsted report for October 2017 (a point when new senior leaders were in place) noted that procedures had been strengthened where previously they were lacking. Ofsted have access to all records within a school setting.
17. The Trust says that, had it been held, parts of this information at least would be likely to be exempt information under section 40(2) of the FOIA as it would be individuals' personal data. However, the Trust says it cannot review the information as it does not exist.
18. With regard to part 3 of the request, the generic risk assessment covering out of school sporting events from September 2016, the Trust has told the Commissioner that this was explored by the Panel, and the following decision on the balance of probabilities was reached:

Exact quote redacted¹
19. The Trust says that risk assessments that the Trust holds are already in the complainant's possession within the TRA bundle that he

¹ The Commissioner has removed the exact quote because it is searchable and would therefore identify the complainant. However the gist is that, where a dispute had arisen over the existence of information, the Panel had preferred the evidence of the witnesses (who had said the documents did not exist) to that of the complainant (who said that they did).

has. However, the 'sport specific' template does not appear to exist and has not been recovered as part of any searches following the Commissioner's decision in November 2020.

20. In supporting its position in relation to this request and the earlier request, the Trust drew the Commissioner's attention to the TRA Panel report which had considered, in detail, the allegations made against the complainant. The Panel had reviewed relevant documents, listened to witnesses and reached a considered verdict.
21. The Trust noted that the complainant had been represented, at the hearing, by both a barrister and a representative from his trade union. It therefore considered that the Panel's findings should carry significant weight in determining whether information is held.
22. The Trust also noted that it had carried out extensive searches both in the course of dealing with this request, the subsequent complaints and, in particular, in preparation for the Panel hearing. Where relevant information had been located, it had been provided.
23. The Trust has accepted, in its correspondence to the Commissioner, that inadequate records had been kept in previous years. Some of the requested information should exist but did not – and the Panel's verdict supported that version of events².

The Commissioner's view

24. The Commissioner considers that, on the balance of probabilities, the Trust does not hold any further information.
25. The Trust is quite right, in the Commissioner's view, to place considerable emphasis on the Panel's findings of fact. The Panel has appropriate powers to require evidence to be produced. The complainant had legal representation during the process and therefore should have been well aware of the Panel's powers. Indeed, the Panel did direct the

² After the decision notice was served, but prior to it being published, the Trust contacted the Commissioner to express concerns over the wording of this paragraph. In particular, the Trust was concerned that the wording implied that the Commissioner had concerns about record-keeping at the Trust as a whole – whereas the issues related to a single school that, during the time period covered by the request, did not form part of the Trust. Whilst the decision notice necessarily has to refer to "the Trust" as the public authority to whom the request was made, the Commissioner is happy to confirm that the evidence about record-keeping presented to her in this case related solely to the school in question – which she acknowledges was outside of the Trust's control during the relevant period – and therefore this particular paragraph should be read as referring to the school in particular, rather than the Trust in general.

Trust to search for a particular email which was subsequently admitted into evidence.

26. Furthermore, the Commissioner notes that the existence of certain documents was not an ancillary matter for the Panel to consider. In the case of many of the allegations, the existence (or, more accurately, the *non*-existence) of records was the central matter that the Panel was required to determine. She therefore considers it highly unlikely that the Panel (which had its own legal advisor) would not have inquired further if it genuinely believed that further relevant material existed.
27. The complainant has argued that information did exist and was withheld from the Panel dishonestly. This is a very serious accusation for which he has provided no proof beyond assertion. Furthermore, the Commissioner notes that the deliberate withholding of information is not something mentioned in the Panel's report – nor did the report criticise the Trust for the quality of the searches it had carried out.
28. Whilst the Panel did note occasional discrepancies between the Trust's account and the complainant's, having considered all the evidence, it preferred the Trust's version of events.
29. The Trust has assured the Commissioner that it has carried out multiple searches of its records to assure itself that it has located all relevant information. Even with suggestions from the complainant as to where the information ought to be found, nothing further has materialised.
30. The Panel's report and the allegations investigated presented a picture of poor record-keeping at the Trust during the time that the complainant was employed there. The Commissioner also notes that several of the allegations involving a failure to keep adequate records were admitted by the complainant and that the Panel found this allegation proven.
31. It is not for the Commissioner to re-visit the Panel's decision. Nor is she required to accept the Panel's findings of fact as definitive. Nevertheless, given the way that the Panel was constituted, the powers that were available to it and the comprehensive way in which it went about its task, the Commissioner considers that there would need to be strong contrary evidence to persuade her that further information was held. No such evidence has been presented to her. The complainant has made repeated allegations of dishonesty on behalf of the Trust but has failed to substantiate them.
32. The Commissioner notes that the Panel considered whether staff had received adequate safeguarding training but did not consider the matter of safeguarding training records, as such. However, given its more general findings about poor record-keeping and the lack of any relevant

information being located by the Trust's searches, she accepts that the Trust does not hold this information (other than the 14 October 2014 date provided to the complainant), or the generic risk assessment. The most likely explanation being that this information never existed in the first place.

33. On the balance of probabilities, the Commissioner is therefore satisfied that the Trust has located all the information that it holds within the scope of parts 2 and 3 of the request.

Section 40(5) – personal information

34. Section 40(5B) of the FOIA allows a public authority to neither confirm nor deny holding information within the scope of a request if the mere act of doing so would itself disclose the personal data of a third party.
35. Part 1 of the request is for information about a safeguarding concern associated with a named individual. The Trust advised it would not release information relating to a safeguarding case. The Trust did not refer to section 40(2) of the FOIA, which concerns personal data, but in the Commissioner's view the Trust's response could suggest that it held the requested information but was withholding it under section 40(2).
36. If the Trust were to confirm or deny that it held information within the scope of this part of the request, it would be confirming or denying that a safeguarding concern had been raised about a specific individual. That would be the individual's personal data as it is biographical information about them.
37. Where a confirmation or a denial would itself involve the disclosure of personal data, the public authority must consider whether such a disclosure could occur without breaching the data protection principles. Specifically, because the personal data is "processed" at the point of publication, there must be a lawful basis for the processing.
38. As there is no indication that any individual referred to in part 1 of the request has consented to disclosure, the Commissioner considers that the only lawful basis for providing a confirmation or a denial that this information is held would be if it was necessary for the purposes of pursuing a legitimate interest.
39. In this case, there will be an interest in ensuring whether any member of staff at a school has had safeguarding concern raised about them. However, the Commissioner considers that confirming or denying that information is held is not necessary to achieve this interest.

40. When a public authority confirms (or denies) under FOIA that it holds particular information it is providing that confirmation (or denial) to the world at large. It is the equivalent of publishing the information on its website.
41. A school's leadership team and governing body are responsible for ensuring that it has a robust safeguarding policy and that safeguarding concerns are managed appropriately. The local authority can, depending on the type of school, also exercise oversight and, in the case of a religious school, so can the local diocese (or equivalent). None of these processes require a confirmation or a denial to the world at large that any particular member of staff has had a safeguarding concern raised against them.
42. The Commissioner therefore considers that providing a confirmation or a denial that this information is held is not necessary to achieve any legitimate interest and thus there is no lawful basis for the processing of this personal data.
43. Whilst the Trust did not seek to rely on a "neither confirm nor deny" response to this part, the Commissioner considers that, in the circumstances, it should have done so, as there was no lawful basis for the personal data to be processed in this way. As such, she now applies section 40(5B) of the FOIA herself proactively to prevent the Trust from making any disclosures of this personal data.

Other matters

44. The Commissioner has already noted her previous decision in which she found that this particular request was not vexatious.³ That decision notice set out the factors that had drawn her to that conclusion and, in particular, what she considered to be the genuine purpose of the request.
45. The Commissioner also noted, at the time, that that decision was one which was finely balanced, and she did not rule out the possibility that future requests from the complainant on this matter might be seen as vexatious.
46. This request was first made in July 2019. Matters have moved on considerably since then and, during the course of this complaint, the complainant has come close to using information requests as a way of undermining, re-arguing or circumventing the Panel's decision.
47. Furthermore, the Commissioner notes that the complainant has levelled numerous allegations of dishonesty and maladministration at the Trust. Whilst these are largely aimed at the Trust's previous employees, there is an implication that, if the Trust does not comply with his wishes, its current management will be "covering up" or condoning the alleged dishonesty.
48. It is evident that the complainant believes that the Panel's decision was flawed. It is his right to dispute that decision – through the proper channels. He is entitled to appeal the Panel's decision and to present evidence after a three-year review. Using the FOIA as a cheap alternative is an abuse of process.
49. Whilst the Commissioner considers each complaint on its own merits, the evidence suggests that point may be approaching (or have even been reached) at which the resources the Trust will have already devoted have become wholly disproportionate to any additional value that would result from responding to further requests.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2619054/ic-45417-w3r4.pdf>

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.
52. 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

Cressida Woodall
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