

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2023

Public Authority: Office for Standards in Education,
Children's Services and Skills
2 Rivergate
Temple Quay
Bristol
BS1 6EH

Decision

1. In the three parts of the request that are the focus of this decision, the complainant asked the Office for Standards in Education, Children's Services and Skills ('Ofsted') some questions relating to a particular inspection. They asked Ofsted whether it had considered some evidence the complainant said they had provided to Ofsted, in relation to safeguarding concerns and the alteration of reports; whether Ofsted had investigated the complainant's concerns; and whether Ofsted had required any action to be taken in view of the complainant's evidence.
2. The Commissioner's decision is that Ofsted is entitled to neither confirm nor deny ('NCND') holding any information, under section 40(5A) of FOIA (personal information); that Ofsted responded to the request within the statutory time for compliance; and the Commissioner has not found a breach of section 16 (advice and assistance).
3. The Commissioner does not require any steps to be taken following this decision notice.

Request and response

4. The complainant asked Ofsted the following questions on 16 February 2022, which were framed as requests being made under FOIA:

"... I am aware that just before the New Year the Ofsted conducted an inspection of the [school redacted] as well as a couple of other Academies belonging to the Trust. My Freedom of Information (FOI) requests are as follows:

1 – When undertaking the inspections did the Ofsted take into account the evidence I presented to support my safeguarding concerns regarding the practice the above alteration of Child Safeguarding reports authored by [organisation redacted] created as a result of a child safeguarding investigation?

2 – More specifically, during the Ofsted inspection of the [school redacted] in December 2021, did the inspectors take into consideration the evidence I provided to the Ofsted that the Trust acknowledged altering Child Safeguarding reports held by the [school redacted] for a specific identifiable case? Did the inspection investigate my concerns which included screenshots of records held on the Trusts Child Protection Online Management System (CPOMS) related to the [school redacted] that I felt an audit of all records regarding that case should be undertaken?

3 – Please could the Ofsted advice where I may view the reports of the inspections of the the Trust's academies conducted prior to the New Year and any since?

4 – In view of the evidence supplied in my complaint to the Ofsted, did the Ofsted require the Trust to take any remedial action concerning the above alteration of Child Safeguarding reports?

5 - Has the Ofsted received any other similar concerns?"

5. In its initial response of 14 March 2022, Ofsted applied section 40(5) to most of the request, although Ofsted did not specify whether it was relying on section 40(5A), 40(5B) or both. Ofsted's position at internal review was that no duty to confirm or deny holding information that is, or would be, a requester's own personal data arises, because such information is 'exempt information' pursuant to section 40(5A) with 40(1); Ofsted also cited section 40(5B) in relation to personal data of other individuals. Ofsted had originally applied section 33 to part 5 of the request only, but at internal review stage Ofsted cited section 33 in relation to parts 1, 2 and 4 too.

Scope of the case

6. The complainant first contacted the Commissioner on 26 September 2022 to complain about the way their request for information had been handled.
7. The Commissioner exchanged correspondence with the complainant and established the issues that the complainant seeks a decision on.
8. The complainant's focus is on parts 1, 2 and 4 of the 16 February 2022 request.
9. The complainant has listed section 10 of FOIA as a key reason for their complaint. The complainant believes that Ofsted, by applying exemptions, has not answered parts 1, 2 and 4 of the 16 February 2022 request.
10. The complainant wants the Commissioner to decide whether Ofsted has correctly applied exemptions to parts 1, 2 and 4 of the request.
11. The complainant has also mentioned section 16 of FOIA (advice and assistance). They believe that Ofsted, by giving a refusal for parts 1, 2 and 4 of the request, has failed to provide advice and assistance.
12. In a letter of 13 January 2022 to the complainant, the Commissioner summarised his understanding of the scope of the case as above (paragraphs 8 – 11). In response the complainant thanked the Commissioner and said that they would await the decision notice.
13. After corresponding with Ofsted, the Commissioner has established that Ofsted's position is to NCND holding information within scope of parts 1, 2 and 4 of the request, pursuant to sections 40(5A), 40(5B) and 33(3) of FOIA (the exemptions for personal information and audit functions).
14. The Commissioner will therefore consider whether Ofsted is able to NCND holding any information within the scope of parts 1, 2 and 4; whether Ofsted was late to respond to the 16 February 2022 request; and whether there has been a breach of section 16.
15. The Commissioner will begin by considering whether section 40(5A) applies, and will only consider sections 40(5B) and 33(3) if he finds that section 40(5A) does not apply.

Reasons for decision

Section 40(5A)

16. The Commissioner directs the complainant to a previous decision notice on his website¹, where he explains (paragraphs 17 – 24) 'the duty to confirm or deny'; the exemption from that duty where a requester asks for information which is, or would be, their own personal data; and what 'personal data' is.
17. Whilst the present case involves a different public authority and more exemptions the Commissioner notes that there are some similarities between IC-54631-Z9R0 and the present case. Both complainants made requests relating to information they claimed to have provided to the public authorities in question, essentially wanting to know whether the public authorities had acted on that information; and both complainants insisted on the public authorities answering their requests **under FOIA**.
18. Parts 1, 2 and 4 of the request in this case ask for information about the handling of evidence and concerns the complainant says **they** submitted to Ofsted, and whether any "remedial action" was required in view of the **complainant's** evidence. The Commissioner is therefore satisfied that the requested information (if it were held) would include the complainant's own personal data. The complainant's focus is clearly on whether Ofsted investigated **their** evidence and concerns, and what the outcome of **their** complaint was.
19. Consequently Ofsted is correct to cite section 40(5A). Under FOIA, there is no duty to confirm or deny holding a requester's own personal data.
20. Section 40(5A) is an absolute exemption, not subject to a public interest test.
21. As the Commissioner finds that section 40(5A) applies to all parts of the request being considered here, he has not moved on to consider section 40(5B) or section 33(3).

Section 17 (with section 10)

22. Where a public authority is relying on an exemption to NCND whether information is held or to refuse to disclose information, then under section 17(1) of FOIA, with section 10(1), it has a duty to issue a refusal notice promptly and within 20 working days of receipt of the request.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619725/ic-54631-z9r0.pdf>

23. Ofsted responded to the 16 February 2022 request on 14 March 2022, within 20 working days of receiving that request. Although the complainant is unhappy about Ofsted's refusal in respect of parts 1, 2 and 4 of the request, the refusal was issued within 20 working days and it did refer to section 40(5).
24. The Commissioner therefore does not find a breach of sections 17 or 10.

Section 16

25. As noted above, the complainant's concerns about section 16 relate to Ofsted's refusal under FOIA in respect of parts 1, 2 and 4 of the request.
26. This decision notice has explained that Ofsted's position is correct regarding those parts of the 16 February 2022 request, and that Ofsted responded within 20 working days with its refusal. That refusal cited section 40(5) and said that under FOIA Ofsted was unable to either confirm or deny that it held any information matching the description of the request.
27. The Commissioner also notes that in the internal review, Ofsted included some general advice about its remit and complaints from individuals.
28. Consequently the Commissioner has not found a breach of section 16 by Ofsted.

Other matters

29. The Commissioner's guidance² says:

"Although you will comply with FOIA ... if you neither confirm nor deny that you hold the requester's personal data, you should also go on to deal with the request as a subject access request".

30. The section 45 Code of Practice³ says:
-

² <https://ico.org.uk/media/for-organisations/documents/2021/2619029/s40-personal-data-of-both-the-requester-and-others-foi-eir-final-version-21.pdf>

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

"... a request for a person's own personal data should be dealt with under the subject access provisions of the Data Protection Act 2018. Sometimes it may be necessary to consider a request under more than one access regime."

31. Whilst he has no power to require it to do so as part of a decision notice he issues under FOIA, the Commissioner would strongly advise the public authority to reconsider the request under the subject access provisions of data protection legislation and respond accordingly if it has not already done so.

Right of appeal

32. 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

33. 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.
34. 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

Daniel Kennedy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF