

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2024

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London SW1P 3PT

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) is entitled to rely on section 40(5B) of FOIA to neither confirm nor deny it holds the requested information about an Education and Skills Funding Agency case. Confirming or denying it holds the information would reveal third parties' personal data and would be unlawful.
2. It's not necessary for DfE to take any corrective steps.

Request and response

3. DfE has provided the Commissioner with a background and context to the request. It concerns an incident at the academy trust named in the request, in 2018. The complainant has previously sent requests for information and subject access requests to that trust and latterly, has sent requests to other bodies.
4. The complainant sent the following information request to the DfE ministers email account on 31 October 2023:

"Under the FOI Act, please could you provide me with all correspondence between yourselves and the DfE (and/or departments of) and the [redacted] Academies Trust (and/or representatives of) for the following ESFA Case Reference: [redacted]."

5. DfE's final position was that the request engaged section 40(5B) of FOIA.

Reasons for decision

6. This reasoning covers whether DfE correctly applied section 40(5B) of FOIA to the complainant's request.
7. Section 1(1)(a) of FOIA places an obligation on a public authority to confirm or deny it holds information an applicant has requested.
8. However, under section 40(5B) of FOIA an authority is entitled to neither confirm nor deny it holds information if simply confirming or denying it holds the information would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
9. The most relevant principle is Article 5(1)(a). This states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
10. In the case of a FOIA request, the personal data is processed when it's disclosed in response to the request. This means that the information can only be disclosed, or a public authority can only confirm whether or not it holds the information, if to do so would be lawful, fair and transparent.
11. The Commissioner has first considered whether the information that would be disclosed if DfE confirmed or denied it holds the requested information could be categorised as personal data.
12. In as submission to the Commissioner, DfE has explained that if it were to confirm it holds the requested correspondence, the complainant or other members of the public could, with other information they may already have, identify the individuals concerned. For example, if there was a 'rumour' that X made an accusation against Y, then confirming that DfE holds correspondence would allow an assumption to be made around the identities of X and Y. In contrast, DfE says, if it denied it holds the information, it's still potentially identifying X and Y, as there was still a 'rumour' about the accusation and their identity, even if there was no correspondence relating to this.
13. DfE also says that if it were to deny that it holds the information for one FOI request, this would mean that where it neither confirmed nor denied in other cases, it could be assumed that in cases where DfE has denied

then there was no case/accusations to be investigated, but in cases where it neither confirmed nor denied, DfE is inadvertently confirming that there **was** a case/accusations.

14. The Commissioner has taken account of DfE's view. He also notes that an Education and Skills Funding Agency (ESFA) reference number would relate to a particular complaint. There is likely to be a small group of people who would know what that complaint was about, and the identities of the individuals involved. The Commissioner consider that the issue here is that confirming or denying that the requested information was held would therefore reveal whether that complaint was or wasn't escalated to DfE.
15. In this case, if DfE were to comply with section 1(1)(a) it would, in effect, be confirming or denying that a complaint had been escalated. In the circumstances, the Commissioner accepts that the complainant, at least, already possesses certain information and it may be the case that other people, such as staff at the named academy, do too. The Commissioner is therefore satisfied that whether or a complaint was escalated is other people's personal data. That's because that matter relates to those people – the data subjects - and the Commissioner considers they could also be identified from it.
16. The Commissioner has gone on to consider whether revealing the personal data would contravene any of the data protection principles. This involves considering three 'tests': the legitimate interest test, the necessity test, and the balancing test.
17. Regarding the legitimate interest test, the complainant clearly has an interest in an incident in 2018, as they've been pursuing it for six years. They've discussed this interest and broader, related concerns in their complaint to the Commissioner. The subject of their request is a legitimate interest for them to have, but is very much a private interest for them, with little wider public interest. There is, however, a legitimate interest in a public authority such as DfE demonstrating it's open and transparent.
18. Regarding the necessity test, to address the above interests it would be necessary to reveal the data subjects' personal data, through DfE confirming or denying it holds the requested information.
19. Finally, the balancing test; the Commissioner must balance the public interest in revealing the personal data through confirming or denying the information is held, against the data subjects' rights and freedoms.

20. Without going into detail in this notice, the incident from 2018 concerns a sensitive matter. The Commissioner considers that that the data subjects in this case would reasonably expect that their personal data wouldn't be revealed to the world at large under FOIA – by DfE confirming or denying it holds the requested information. Revealing it would therefore cause those people harm or distress due to the invasion of their privacy.
21. Given that there's little wider public interest in the substantive matter, the Commissioner considers that the public interest in DfE being transparent is outweighed, in this case, by the data subjects' rights and freedoms.
22. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that revealing the data subjects' personal data – by confirming or denying the requested information is held - would be unlawful as it would contravene the data protection principle set out under Article 5(1)(a) of the UK GDPR. DfE was therefore correct to apply section 40(5B) of FOIA to the request.

Right of appeal

23. 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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
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Wycliffe House
Water Lane
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