

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2019

Public Authority: Delta Academies Trust
Address: Education House
Spawd Bone Lane
Knottingley
WF11 0EP

Decision (including any steps ordered)

1. The complainant has requested the trust to disclose whether the named individuals within a list he provided had first aid certificates on the date of each trip that was detailed in the list. He also asked for the date of when each first aid certificate had been obtained, when it was due to expire and to be provided with a copy of each certificate. The trust refused to disclose the information citing section 40(2) of the FOIA. It also stated that section 14(2) of the FOIA applied.
2. The Commissioner's decision is that section 14(2) of the FOIA does not apply. However, she has decided that the trust is entitled to refuse to disclose the requested information under section 40(2) of the FOIA.
3. The Commissioner has found the trust in breach of section 10 of the FOIA, as it failed to respond to the complainant's request within 20 working days of receipt.
4. The Commissioner does not require any further action to be taken.

Request and response

5. On 26 July 2018, the complainant wrote to the trust and requested information in the following terms:

"In accordance with the freedom of information act can you please confirm which abbreviated named individuals within the attached trip list

provided by [name redacted] had a first aid certificate on the date of each trip as detailed with in the attached Trip list, and can you please confirm the date of when each first aid certificate was obtained and expires and please provide a copy of each certificate”

6. As the complainant did not receive a response, he referred the matter to the Commissioner on 28 August 2018.
7. The Commissioner wrote to the trust on 2 October 2018 to request that it responds to the request in accordance with the FOIA within 10 working days.
8. The trust responded to the request on 10 October 2018. It stated that section 14(2) applied and also the information was exempt from disclosure under section 40(2) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 11 October 2018 to complain about the way his request for information had been handled. The Commissioner accepted the complaint for full investigation without the need for an internal review on this occasion. This was because the complainant had already made the same request a few months earlier and obtained an internal review and it was clear the trust’s position remained unchanged and also to prevent any further delays for the complainant.
10. The Commissioner considers the scope of her investigation to first determine whether section 14(2) of the FOIA applies. If it does not she will then go on to consider the trust’s application of section 40(2).

Reasons for decision

Section 14(2) – repeated requests

11. Under section 14(2) of the Act, a public authority does not have to comply with a request which is identical, or substantially similar to a previous request submitted by the same individual, unless a reasonable period has elapsed between those requests. There is no public interest test.
12. The Commissioner has issued guidance on the application of this exemption, which can be accessed here:

<https://ico.org.uk/media/1195/dealing-with-repeat-requests.pdf>

This clearly states that a public authority may only apply section 14(2) where it has either:

- previously provided the same requester with the information in response to an earlier FOIA request; or
- previously confirmed the information is not held in response to an earlier FOIA request from the same requester.

The guidance states clearly that if neither of these conditions apply the public authority must deal with the request in the normal manner.

13. In this case the trust refused to comply with the complainant's first request, as it considered the information is exempt from disclosure under section 40(2) of the FOIA. The trust did not disclose the information (bullet point one above) or say that it was not held (bullet point two above). The Commissioner is therefore satisfied that section 14(2) of the FOIA does not apply.

Section 40(2) – personal data

14. 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)(3B) or 40(4A) is satisfied.

15. 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').

16. 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.

17. 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.

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

Is the information personal data?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to those data subjects referenced in the complainant's request. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. 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.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. 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.
27. 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

28. 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.

29. 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 question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. 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

31. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
32. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The trust stated that it understood that the complainant wishes to establish whether the trust has sufficient staff with first aid certificates on educational trips and visits and more widely wishes to determine whether the trust is dealing with educational trips in a proper manner. Disclosure would also promote openness, transparency and accountability. It also stated that the complainant requires this information to pursue more private matters with the trust.
34. The Commissioner accepts that there is a legitimate interest in the disclosure of the requested information. It would promote openness, transparency and accountability as the trust has stated. It would also provide the public and the complainant with more insight into how educational trips and visits are managed at the trust and what first aid cover was in place at specific trips and visits. As stated above, legitimate interests can include the complainant's own private interests too and the trust has said that the complainant wishes to access this information to enable him to pursue private matters with the trust.

Is disclosure necessary?

35. '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.
36. The trust has said that it does not consider disclosure of the withheld information is necessary to meet the complainant's legitimate interests. Instead it believes it can deal with the complainant's request by less intrusive means. It stated that the complainant does not need the names of the relevant staff members or their first aid certificates. Instead he simply needs confirmation that the trust has sufficient

employees with valid first aid certificates in place for each of the trips he referred to. The trust stated that it has already provided that information to the complainant and due to the complainant's own circumstances and knowledge of the trust he may be able to determine who those staff members are without the disclosure of their personal data.

37. Whilst the trust has disclosed some information to the complainant, it is noted that the complainant clearly does not consider this meets his request or the legitimate interests he is trying to pursue. The complainant requires to know which members of staff on certain educational trips and visits had current first aid certificates and to know when they were obtained and expire. The disclosed information goes some way to meeting that but it does not identify who the relevant staff were on the said trips and visits. Disclosure of the withheld information is therefore 'necessary' to meet the legitimate interests already identified even if these are the more private legitimate interests the complainant is pursuing.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

38. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
39. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
42. The trust advised that the individuals concerned would not expect their personal data to be disclosed to the world at large and therefore disclosure would not be fair. It stated that the data subjects would expect this information to be confidential and remain that way.
43. The Commissioner notes that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large, which is what disclosure under the FOIA effectively means. Disclosure would confirm to the world at large the names of those staff with current first aid certificates that attended the various educational trips and visits the complainant is interested in. Disclosure would also release into the public domain a copy of the relevant staffs' certificates, the date it was obtained and expires. Considering what information has already been supplied by the trust, the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects. The data subjects would only expect this type of information to be used for work purposes and would not have any expectation that the information could be disclosed into the public domain for anyone to see. As a result the Commissioner accepts that disclosure would cause the data subjects some distress and upset.
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Procedural matters

46. The Commissioner notes that the trust failed to respond to this request within 20 working days of receipt. The Commissioner therefore finds the trust in breach of section 10 of the FOIA.

Right of appeal

47. 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@hmcts.gsi.gov.uk

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

48. 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.
49. 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

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