

# Private eye

Tom Morrison returns with his quarterly review of the world of information law



## IN BRIEF

► Education providers such as schools (including academies), colleges and universities are classified as public authorities for FOI purposes, which among other things means that they must have publication schemes in place and respond to requests for information received from any third party.

► Data protection takes on extra meaning when you are dealing with education providers that can have up to a few thousand staff, and many tens of thousands of students, often with quite sensitive information under the organisation's control.

In the previous edition of this column we looked at how our freedom of information and data protection regime affects social housing providers. The second in this series of sector focused pieces concentrates on the education sector. Academies, other types of schools, colleges and universities (referred to together as education providers for the purposes of this column) are caught directly by the Freedom of Information Act 2000 and Environmental Information Regulations 2004 (together FOI legislation). When you add into the mix that the Data Protection Act 1998 (DPA 1998) impacts on almost everything education providers do, due to the large number of staff and students with

whom they interact, it is fair to say that information law compliance is a big and sometimes resource-hungry issue to get right, but potentially a very damaging and expensive one to get wrong.

## The impact of being a public authority for FOI purposes

Many people assume that all public authorities are substantial in size and have more than enough resource to throw at FOI compliance. The former is often true—colleges for example routinely employ hundreds of staff, sometimes thousands—but resources are necessarily finite and in a world of decreasing state-funding efficiencies are constantly being sought. The difficulty in that argument is that, if the Information Commissioner's Office (ICO) accepted it, a huge hole would be blown in a regime which is designed principally to hold public authorities to account. FOI clearly comes at a cost; whether the extent of the cost is proportionate to the benefit of the regime is an argument based partly on perspective.

So just what is the real life impact of FOI on education providers? In basic terms, it can be whittled down to two key obligations.

## Publication schemes

The more straightforward requirement

of FOI legislation is to make available a publication scheme. This is effectively a summary of what information will be routinely made available to the public. One relatively simple way of achieving compliance is to structure an area on the education provider's website around one of the ICO's template schemes, with placeholders for information to be updated as appropriate.

## Requests for information

The most well-known consequence of FOI legislation is that anyone who is interested can ask an education provider whatever he or she wants without having to say why he or she wants that information. So long as the information sought is held by or on behalf of the education provider then he or she is entitled to be told the answer within 20 working days unless an exemption applies. Typical information sought from education providers includes how the provider spends its money internally (eg how much the senior team is paid, how much was spent on compromise agreements), what its requirements for goods and services are (eg how much the education provider spent on paper last year) and tender information (eg who won the tender, what was their pricing, what did their tender document say about a particular issue). Each of these raises issues which mean that someone might not be happy with the fact that information is either disclosed (eg the provider's personnel, existing suppliers or winners of tenders who are competing against the enquirer elsewhere) or equally the enquirer might not be happy if the information is withheld.

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Some parts of the sector have specific challenges. Guidance has been produced, for example, for higher education institutions to assist in determining how best to respond to requests for research information. This arose directly out of the House of Commons Science and Technology Committee recommending that the ICO produce guidance following high-profile cases about the disclosure of data and other information involving

University of East Anglia climate change. The guidance highlights just how complex such issues can become, especially when attached to something as core to a university as its valuable research.

In more general terms, there are a range of exemptions, some of which involve weighing up the public interest in disclosing information against the benefit in withholding it. Exemptions include that the information is personal data under DPA 1998, that disclosure would constitute an actionable breach of confidence or that disclosure would harm commercial interests.

So can an education provider be liberal in its application of an exemption if, for example, it does not wish to disclose potentially embarrassing information? The short answer is no. Most of the exemptions are narrowly construed, all can be considered by the ICO if the enquirer is dissatisfied, and the education provider will be rebuked if the exemptions are inappropriately applied.

The two key FOI obligations clearly interact. If an effective publication scheme is put in place, and if that scheme is updated to take account of information frequently sought, then instead of being a bureaucratic measure to be tolerated, a publication scheme becomes an effective way of dealing with routine information requests. The education provider can legitimately say that the information sought is available elsewhere, such as on its website.

### The impact of data protection legislation on education providers

The DPA 1998 impacts upon education providers in exactly the same manner as all other organisations which hold information. The difference is that education providers usually hold information about a large number of people (so anything going wrong could be on a large scale) and they often hold sensitive information about young people (so if it does go wrong the associated harm could be significant).

Most education providers have robust policies, procedures and systems to try to keep information secure. If something goes wrong it is often down to human error associated with a lack of appropriate training.

Security of information is always going to be an issue, but the DPA 1998 is about much more than that. It is beyond the scope of this column to recant in detail the basic data protection obligations every education provider has; suffice it to say that information must be used only for the purpose for which it was collected, must not be disclosed to third parties inappropriately and must generally

be disclosed back to the individual if requested. A lack of properly informed consent is often at the heart of complaints: if, for example, a student knew how information was going to be used and gave a positive thumbs up at that time, then the education provider is going to be on safer ground if the student later complains about that use.

### Data protection issues prevalent in the sector

Subject access is a big issue for the sector. Students may be looking for detailed exam marks, exam scripts, comments of examiners, minutes of examination appeals panels or providers' policies and procedures relating to marks and appeals. While students do have a general right to their personal information, education providers can sometimes withhold certain types of information such as exam scripts, and there are exemptions for delaying publication of results depending on the timing of the request. Examiners' comments may well be disclosable. Equally, disgruntled staff

must be offered. These and similar issues are dealt with in the Protection of Freedoms Act 2012, the relevant parts of which come into force in September 2013. The Department for Education has issued new guidance to assist, and the Department for Business, Innovation and Skills will be doing the same.

At least twice per year the ICO issues a press release comforting parents who wish to take photos at sports days or capture images of their children in the nativity play. There are exemptions for personal use which family members can rely upon. Education providers and the media can generally use photographs if proper consent has been obtained. The trick is remembering to ask, and to avoid using them elsewhere.

### Consequences

Potential fines for serious breaches of DPA 1998 are not small—up to £500,000—but the reality is that no education provider wants to have its reputation damaged by being found to be in breach. Providers

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on a fishing expedition prior to bringing a tribunal claim may wish to know what notes are held about them, so that they can find out if there is an e-mail about them that their (sometimes former) employer rather they did not see.

The use of biometric information, particularly in schools and colleges, is on the increase. Knowing where students are located at any given time is a cornerstone of safeguarding. If you can verify that with a fingerprint or iris scan then you are likely to assume that your records are accurate and you will probably be right. The greatest concerns tend to centre around just how secure the system is, what information will be used for (eg only to confirm attendance or assist with cashless payment systems) and if the information is lost what could its implications be. In many cases, suppliers can demonstrate that the retained information is not in fact a copy of the fingerprint or iris image, but an algorithm which is useless to anyone other than the owner of the finger or the eye. The difficulty can be what to do with the child or parent who is point blank refusing to allow the system to be used? The short answer is that alternative methods of accessing the relevant services

are on a very public stage with inherently critical stakeholders. We as a society care that people are properly educated by competent providers. The last thing we want to see is an education provider being found to have misused or lost information.

Education providers have a lot on their plates providing outstanding education. It is for each provider to determine what resource is allocated to dealing with each area of regulatory compliance. When it comes to freedom of information and data protection, the one thing a provider can be sure of is that the ICO as regulator will not be interested in hearing about overstretched resources. Common sense says that targeting areas of greatest risk in a smart and effective manner is sensible, but the requirements set out in FOI legislation and DPA 1998 are mandatory minimum standards. Those officers within education providers who are tasked with ensuring compliance will have no choice but to continue to argue their case for sufficient resources to enable them to not drop the ball.

NLJ