

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2017

Public Authority: Kensington and Chelsea College

Address: Hortensia Road
London
SW10 0QS

Decision (including any steps ordered)

1. The complainant has requested information relating to the departure of two individuals. The Kensington and Chelsea College (the College) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The Commissioner's decision is that the College has correctly applied section 40(2) of FOIA to the withheld information.
2. The complainant also requested information concerning business dealings with a consultancy company. The College refused to provide the requested information citing the exemption under section 41 (provided in confidence) and section 43 (commercial interests) as its basis for doing so. The Commissioner's decision is that the College has correctly applied section 41 to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. The complainant made two requests for information concerning the departure of two employees which were considered together by the College.

Request 1

5. On 30 January 2017 the complainant requested the following:

Please can you supply me with any documents, minutes of meetings (confidential or public), written reports, emails, statements, records of telephone conversations or any other information that in any way refers to the matter of the resignation and departure of [redacted name A] as Principle of Kensington and Chelsea College.

I would expect the documents that I have requested to provide me with a full and comprehensive account of the reasons why [redacted name A] left his role as Principle at Kensington and Chelsea College and an explanation of why his resignation has not been recorded in the College's minutes?'

Request 2

6. On 8 February 2017 the complainant requested the following:

Please can you supply me with any documents, minutes of meetings (confidential or public), written reports, emails, statements, records of telephone conversations or any other information that in any way refers to the matter of the resignation and departure of [redacted name B] as Deputy Principle of Kensington and Chelsea College.

I would expect the documents that I have requested to provide me with a full and comprehensive account of the reasons why [redacted name B] left her role as Deputy Principle and an explanation of why her departure has not been recorded in the College's minutes.

Please can your office provide me with information of any business dealings or contracts that the Kensington and Chelsea College may have entered into or discussed with a consultancy company called F E Associates.

Please provide me with any correspondence, minutes of meetings or invoices that exist between the Kensington and Chelsea College and F E Associates.

Please provide me with any correspondence, minutes of meetings, business dealings or contracts and invoices that the Kensington and Chelsea College entered into with any company that were subsequently found to have links with [redacted name B].

It is my understanding that [redacted name B] was the subject of a so called "gagging order" while employed by the Kensington and Chelsea

College. Please can you confirm whether this was the case or not and provide me with any information relating to this matter or any information relating to disciplinary measures taken against [redacted name B] while in the employ of Kensington and Chelsea College.'

7. On 3 March 2017 the College refused to provide the requested information relating to [redacted name A] and [redacted name B] under section 40 of FOIA as it was personal information. The College also refused to provide the requested information in relation to any business dealings with FE Associates under section 41 (confidential information) and section 43 (commercial interests) of FOIA.
8. On 17 March 2017 the complainant requested an internal review into the handling of the requests as there were a number of rumours circulating in the local community re 'some form of misconduct in office' and possibly 'safeguarding issues'.
9. On 20 March 2017 the College provided the outcome of the internal review which upheld the original decision.

Scope of the case

10. The complainant contacted the Commissioner on 20 March 2017 to complain about the way his request for information had been handled. He argued that:

'the local community has a right to know the full facts behind the departure of these 2 individuals and how their behaviour maybe inked to the demise of the standards of the College'

11. The Commissioner considers the scope of this case to be to determine if the College has correctly applied section 40(2) of FOIA to the withheld information relating to the departure of the two individuals and if the College has correctly applied section 41 of FOIA to the withheld information relating to the consultancy company. The Commissioner will only go on to consider section 43 if section 41 has not been cited correctly.

Reasons for decision

Section 40(2) – Third party personal data

12. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

13. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
14. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
15. It is clear from the requests that the information relates to two living identifiable individuals and is therefore personal data. Therefore, the Commissioner is satisfied that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

Would disclosure breach the Data Protection Principles?

16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
17. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

18. The view of the Commissioner is that there is an expectation that an employee in a public authority will have a certain amount of information about them disclosed i.e name, job title, work telephone number. However, the complainant has asked for information relating to the detailed circumstances for the departure of two named individuals.

19. The Commissioner has issued guidance about requests for personal data about public authority employees:

https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf

20. This guidance talks about whether the information requested relates to them as an individual or in their professional role, and is information contained in their personnel file as opposed to actions they have taken in carrying out their job. It also suggests consideration should be given to whether the employees are senior within the organisation or have a public facing role. The more senior the individual and/or the more public facing their roles are the greater their expectation should be that information about them would be released and the more likely it would be to conclude that it would be fair to do so. It is clear that the Principle and Deputy Principle of the College are senior roles.
21. However, the named individuals would not expect the specific information the complainant has requested to be released. There is no expectation from these individuals that the detailed reasons for leaving the College would be made publicly available under FOIA. The Commissioner understands that the College would not routinely make public such information and is prepared to accept these arguments.

Consequences of disclosure/Damage and distress

22. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
23. The College has stated that disclosure of the personal data would be contrary to the named individuals' expectations and therefore unfair.
24. Upon viewing the arguments from the complainant and the College, the Commissioner accepts that disclosure of the reasons for their departure would be distressing for the named individuals.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

25. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
26. In this case, the Commissioner has noted the rumours and concerns of the local community as explained by the complainant but she is not

convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.

27. The Commissioner is satisfied that it would be unfair to provide information concerning the leaving reasons from employment at the College. Such disclosure would contravene the first data protection principle and would not be fair.
28. The Commissioner is therefore satisfied that the College was correct to refuse to disclose this information under section 40(2) of the FOIA and has gone on to consider the other exemptions cited by the College for the business dealings part of the second request.

Section 41 – information provided in confidence

29. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.
30. The College identified two documents that it said were exempt under section 41: a letter dated 12 December 2013 concerning the appointment and financial arrangements for a named consultant and four invoices in relation to the named consultant.

Was the information obtained from another person?

31. The College stated that the information was provided to it by FE Associates. The Commissioner is satisfied that this is the case.

Would disclosure constitute an actionable breach of confidence?

32. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

33. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
34. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Commissioner has viewed the withheld information and considers that it cannot be said to be trivial as it constitutes the bespoke financial information about the employment of a named consultant.
35. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

36. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".
37. The College has stated that 'any commercial contracts or dealings entered into between the College and a third party would necessarily constitute confidential information that should not be disclosed under the Act.'
38. The Commissioner notes from her guidelines that the contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another.
39. However, in this case, the 'contract' relates to one named consultant and the bespoke financial information of the consultant's employment which was provided to the College. The invoices (which also contain the bespoke financial information for one named consultant) were also provided to the College by FE Associates.
40. The Commissioner considers that the personal detail of the named consultant within the withheld information was supplied to it by FE

Associates with an implied and explicit obligation of confidence. She therefore accepts that there is the necessary quality of confidence.

Would disclosure be of detriment to the confider?

41. The Commissioner is satisfied that the withheld information contains the personal information of the named consultant and could be withheld under section 40.
42. This means that the authority is not required to demonstrate that the confider would suffer any tangible detriment from disclosure. The real impact of disclosing private, personal information will be an infringement of the confider's privacy, and there is a strong public interest in protecting the privacy of individuals.

Is there a public interest defence for disclosure?

43. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the College could successfully rely on such a public interest defence to an action for breach of confidence in this case.
44. For her part, the Commissioner accepts that there is a general public interest in public authorities being open and transparent about the ways in which contracts with private organisations are awarded.
45. The College has argued that breaching the duty of confidence it has to FE Associates would be highly likely to have a detrimental impact on its relationship with them.
46. The Commissioner is mindful of her own guidance:

"There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions".¹

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http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/SEC41_CONFIDENCE_PUBLIC_INTEREST_TEST_V1.ashx

47. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
48. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
49. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA and has not gone on to consider section 43.

Other matters

50. The Commissioner is disappointed that the College did not engage more fully with the Commissioner's enquiries. Detailed questions were asked on each exemption cited but minimal responses were provided by the College. The Commissioner expects the College, in the future, to provide substantial arguments to support its position. Otherwise, the Commissioner may have no option but to order disclosure of the requested information.

Right of appeal

51. 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

52. 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.
53. 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

Pamela Clements
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