

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2019

Public Authority: The Governing Body of Richmond and Hillcroft Adult Community College

Address: Parkshot
Richmond
TW9 2RE

Decision (including any steps ordered)

1. The complainant has requested the qualifications of five members of staff. The governing body of Richmond and Hillcroft Adult Community College ("the College") withheld the information, relying on section 40 of the FOIA (third party personal data) to do so.
2. The Commissioner's decision is that the College has correctly applied section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require any further steps to be taken in respect of this request.

Request and response

4. On 28 March 2019, the complainant wrote to the College and requested information relating to a particular course in the following terms:
"In relation to the Freedom of Information Act I am writing to request details of the qualifications of the college staff involved in preparing and delivering this course."
5. The College responded on 25 April 2019. It provided the complainant with a list of the qualifications that the five staff members held between them, but without attributing any particular qualification to a particular staff member. It stated that publishing an attributable list would violate the General Data Protection Regulation (GDPR) principles and therefore

the information was exempt under section 40(2) of the FOIA. However, it also provided an assurance that:

"all of the staff listed hold diploma level qualifications that satisfy the requirements of the awarding body."

6. Following an internal review the College wrote to the complainant on 24 May 2019. It upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 31 May 2019 to complain about the way his request for information had been handled.
8. Having sought submissions from the College and viewed the withheld information, the Commissioner advised the complainant that she considered section 40 to have been correctly applied. The complainant broadly accepted the Commissioner's reasoning but requested that she set out her decision in a formal notice.
9. The Commissioner considers that the scope of her investigation is to determine whether the College was entitled to rely on section 40(2) to withhold the requested information.

Reasons for decision

10. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*
11. 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.

12. 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').
13. 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.
14. 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.

Is the information personal data?

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. The Commissioner considers that, when read together with the request, the withheld information would identify the staff involved. She also considers that a person's qualifications provide biographical details about that person's life and hence relate to that person. She is therefore satisfied that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.

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

Would disclosure contravene principle (a)?

20. 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.

21. The most relevant DP principle in this case is principle (a).

22. 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".

23. 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.

Lawful processing: Article 6(1)(f) of the GDPR

24. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

25. 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.

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".

26. 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.
27. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

28. 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.
29. 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.
30. The Commissioner accepts that current and prospective students would have a legitimate interest in knowing that a course which they were taking or proposing to take was being led by staff who were appropriately qualified for the role.

Is disclosure necessary?

31. '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.
32. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requestor. It is the equivalent of the College publishing the information on its website.

33. In this particular case, the Commissioner notes that the College's courses are overseen by an accrediting body. That accrediting body would have the power to intervene if it felt that a course was not being delivered in accordance with its accreditation rules and the Commissioner considers that this would be a much less intrusive means of satisfying the legitimate interest than publishing the qualifications of staff members.
34. The Commissioner also notes that the College has disclosed an aggregated list of qualifications and provided an assurance that all the members of staff covered by the request were appropriately qualified.
35. The question for the Commissioner is to determine whether any further interest is served by publishing an attributable list and whether such a list is necessary. In the Commissioner's view, such a list is *not* necessary for the College to satisfy the legitimate interest in ensuring that staff are appropriately qualified.
36. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is thus unlawful, so does not meet the requirements of principle (a).
37. The Commissioner has therefore decided that the College was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

38. 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

39. 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.
40. 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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