

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2023

Public Authority: Governing Body of Heart of Worcestershire
Address: College
Peakman Street
Redditch
B98 8DW

Decision (including any steps ordered)

1. The complainant has requested disciplinary information relating to specific members of staff. The Heart of Worcestershire College ("the public authority") refused to confirm or deny that it held the requested information, citing section 40(5B)(a)(i) (personal information) of FOIA.
2. The Commissioner's decision is that the public authority was correct to neither confirm nor deny that the requested information was held.
3. The Commissioner does not require further steps.

Request and response

4. On 21 August 2023, the complainant wrote to the public authority and requested:

"I am requesting all employment details including records of any disciplinary action made for the following individuals

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

In addition

the persons named [Redacted] and [Redacted] who would have been teaching [Redacted] 2008-2010

the persons named [Redacted] who would have been working [Redacted]

In addition I would like to remind you that as these persons are already known to me I would like to remind you that it is not meritorious to redact them, and doing so would only serve to render the data deliberately obfuscated, named that can be reasonably assumed to be known to me should be shown, and when they are not they should be clearly labelled with anonymous identifiers and clear job titles, in order to render the documentation properly readable."

5. The public authority responded on 19 September 2023. It refused to confirm or deny whether the requested information was held, citing section 40(5B) of FOIA.
6. The complainant requested an internal review on the same day.
7. Following an internal review the public authority wrote to the complainant on 29 September 2023, it upheld its previous position.

Reasons for decision

8. Section 1(1)(a) of FOIA states that anyone who requests information from a public authority is entitled to be told whether or not the authority holds that information.
9. However, section 40(5B)(a)(i) of FOIA states that a public authority doesn't have to confirm or deny that it holds information if to do so would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR.')
10. For the public authority to accurately rely on section 40(5B)(a)(i), the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.
11. When considering a neither confirm nor deny response, the Commissioner will not consider whether or not the requested information is actually held. He'll just consider the hypothetical effects of either confirming or denying the requested information is held.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

12. Section 3(2) of the Data Protection Act 2018 defines personal data as "any information relating to an identified or identifiable living individual".
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. The request concerns ten individuals and their employment records including whether they were subject to any disciplinary action. Whether or not an individual is the subject of any disciplinary action is information that relates to them.
16. The Commissioner is satisfied that, if the public authority confirms it holds information within scope of the request, it's effectively confirming that at least one of the individuals named in the request has been the subject of disciplinary action.

17. If the public authority denies holding the requested information, it's effectively confirming that none of the individuals named in the request have been the subject of disciplinary action.
18. As per the request, the complainant may already know if the individuals named in the request have been subject to disciplinary action. However, disclosure under FOIA is disclosure to the world at large. It's not about what the complainant would learn but what information any member of the public would learn.
19. The Commissioner is satisfied that individuals are identifiable from the request and that the requested information, if held, would relate to them. He is therefore satisfied that confirming whether or not the requested information is held would disclose those individuals' personal data as it would indicate whether or not they have been subject to disciplinary action.

Would confirming or denying the information is held contravene one of the data protection principles?

20. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

21. In the case of a FOIA request, personal data is processed when it's disclosed in response to the request or, as in this case, if the authority confirms or denies it holds the personal data. This means that the public authority can only confirm or deny it holds the information if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
23. The lawful basis most applicable is Article 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”.

24. In considering the application of Article 6(1)(f) in the context of a request for information made under FOIA, it's 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 confirmation/denial that the information is held 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(s) (in this case, the individuals named in the request)
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits.
27. If the requester is pursuing a purely private concern which is unrelated to any broader public interest then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
28. At the time of raising their complaint, the complainant confirmed "basic information should be available, such as who works at an institution and data relating to disciplinary records at a time when I was attending."
29. With the above in mind, the Commissioner is satisfied that there is a legitimate interest in disclosure of this information.

Is disclosure necessary to meet the legitimate interests?

30. The Commissioner accepts that, for the complainant, confirmation or denial would be necessary in this case. The complainant has specific concerns and confirming or denying that the requested information is held would help to address those concerns, although not fully.
31. Because the Commissioner has found that confirming or denying the information is held is necessary to meet the complainant's legitimate interests, it's necessary to carry out the third test and balance the

legitimate interests against the data subjects' interests or rights and freedoms.

Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).

32. In this case, it's necessary to consider the hypothetical impact of confirming or denying the information is held. For example, if the data subjects would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, the data subjects' interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
33. The Commissioner is mindful that disciplinary procedures are confidential. It's a reasonable expectation that an employer will not confirm to the world at large that a individual is the subject of disciplinary procedures. Furthermore, as some of the individuals named in the request no longer work at the public authority, there is an even greater expectation of confidentiality.
34. If the public authority confirms that information is held, it discloses the world at large details of disciplinary action that happened fifteen years ago. The Commissioner has no doubt that confirmation that the information is held would cause distress to the data subjects.
35. The Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and disclosure of personal information in this instance.
36. As a result, the Commissioner is satisfied that the public authority was entitled to rely on section 40(5B)(a)(i) of FOIA. This means that it was not obliged to confirm or deny whether the information requested was held.
37. Since disclosure would be unlawful, the Commissioner doesn't need to consider whether confirmation or denial would be fair or transparent.

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: 0203 936 8963

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

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