

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2024

Public Authority: Governing Body of Ysgol Friars
Address: Ffordd Eithinog
Bangor
Gwynedd
LL55 1SH

Decision (including any steps ordered)

1. The complainant requested copies of the minutes of the Governing Body at Ysgol Friars (the School) which dealt specifically with two employment tribunal cases. The School provided copies of the minutes in question, subject to some information being redacted under section 40(2) (personal information) and section 44 (prohibitions on disclosure). During the course of the Commissioner's investigation the School withdrew its reliance on section 44 of the FOIA but maintained the section 40(2) applied to the request. The School stated that it also considered some of the withheld information to be exempt under section 41 (information provided in confidence) and section 42 (legal professional privilege).
2. The Commissioner's decision is that the School has correctly applied section 40(2) to all of the withheld information. He does not require any steps to be taken.

Background information

3. The complainant in this case is a member of staff at the School and they initially submitted the request via the School's email system. The complainant made it explicitly clear that the request was being submitted under regulation 48 of the Government of Maintained Schools

(Wales) Regulations 2005¹ (the Regulations). The exact wording of this request was for:

“Governors’ Meeting Minutes at Ysgol Friars specifically dealing with the discussions regarding the two employment Tribunal Reports.....What I expect to see is a copy of the relevant minutes in their original format including:

- Those present
- Apologies
- Agenda
- Matter arising

With only the sections that the governing body deem to be confidential redacted ie blacked out”.

4. The School provided the information requested, subject to redaction of any confidential items under regulation 48(2) of the Regulations and considered that it had complied with the request.
5. The request was later referred to the Council, as the Local Education Authority for the School, as a freedom of information request as the Council provides support for schools in its area in managing information requests and providing responses. As such, any reference within this notice to the Council is in relation to its role to provide advice on request handling to the School. The School is the public authority for the purposes of this notice.

Request and response

6. On 28 September 2023 the complainant requested information in the following terms:

“copies of the Governors' Meeting Minutes at Ysgol Friars specifically dealing with the discussions regarding two Employment Tribunal Reports, specifically those related to [name individual A redacted] & [name individual B redacted]”.

¹ <https://www.legislation.gov.uk/wsi/2005/2914/regulation/48/made>

7. The Council responded on 26 October 2023 and provided the information requested, subject to some information being redacted under sections 40(2) and 44 of the FOIA.
8. On 6 November 2023 the complainant wrote back to the Council and stated that they were seeking access to full copies of the minutes, including the agendas, matters arising, attendee list etc, and not just excerpts of the meeting minutes.
9. On 24 November 2023 the Council wrote back to the complainant and referred to their original request and confirmed that the "parts of the minutes specifically dealing with the discussions specified was sent to yourself. Some information was not sent because of certain FOI exemptions".
10. On 29 November 2023 the complainant wrote to the Council and expressed dissatisfaction with its handling of the request. They stated that they were seeking access to copies of the minutes in their original format, with any confidential information redacted.
11. On 5 December 2023 the Council wrote to the complainant again and asked them to confirm whether they were now asking for a copy of the agendas for the meetings concerned.
12. The complainant responded on 6 December 2023 and reiterated that they had expected to receive a copy of the relevant minutes in their original format, which included, the list of attendees, apologies for absence, matters arising and agendas etc, and for any exempt information to be redacted.
13. On 7 December 2023 the Council provided complete copies of the minutes in question, subject to confidential information being redacted.
14. On 11 December 2023 the complainant wrote back to the Council and expressed dissatisfaction with its handling of the request and raised two specific issues. Firstly, they asserted that the Council should explain the reason for each of the redactions. Secondly the complainant asked whether the minutes had been reviewed by one of the Council's legal team.
15. The Council responded on 11 December 2023 and confirmed that the information that had been redacted from the minutes had been withheld under sections 40(2) and section 44 of the FOIA.
16. The Council issued a further response on 20 December 2023 and stated:

"Thank you for your request for an internal review of the application which was forwarded to my attention. However, I note that the

requested information has been sent to you on the 7th of December – I also note the point you make about regulation 48”.

Scope of the case

17. The complainant contacted the Commissioner on 11 January 2024 to complain about the way their request for information had been handled.
18. During the course of the Commissioner’s investigation, the Council withdrew its reliance on section 44 of the FOIA. It maintained that all of the withheld information was exempt under section 40(2) of the FOIA. The Council stated that it considered some parts of the withheld information to also be exempt under section 41 and other parts to also be exempt under section 42.
19. The Council also confirmed that it had redacted other confidential information from the minutes which was outside the scope of the request as it did not relate to the two employment tribunal cases referred to in the request. As the request referred specifically to discussions about the two tribunal cases and the complainant agreed that confidential information could be redacted the Commissioner has not considered this ‘out of scope’ information within this notice.
20. The Commissioner considers that the scope of his investigation is to determine whether the Council correctly relied on the exemptions quoted to withhold information falling within the scope of the request, ie information relating to the two employment tribunal cases referred to in the request.

Reasons for decision

Section 40 – personal data

21. 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.
 22. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the
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² As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

23. 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.
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.
28. 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.
29. The withheld information in this case comprises extracts contained within the minutes of the Governing Body of the School relating to the two employment tribunal cases referred to in the request involving School staff. The Commissioner is satisfied that the information both relates to, and identifies the individuals concerned. The withheld information also contains some personal data of other third parties, for example other staff members and former staff members of the school, specifically in relation to their involvement in the tribunal cases. The Commissioner is satisfied that all of the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
30. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

31. 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”.

32. 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.

33. 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.

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

34. Article 6(1) of the UK 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.

35. 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”³.

³ 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

36. In considering the application of Article 6(1)(f) of the UK 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.
37. 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

38. 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 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
39. The complainant has not submitted any specific representations as to why they think the information should be disclosed. However, the Commissioner notes that in various communications, the complainant has confirmed that they were happy for any confidential information contained within the minutes to be redacted.
40. The Commissioner accepts that there is a legitimate interest in disclosure of information about how the School has dealt with and managed the two employment tribunal cases in question. Understanding how the School dealt with the tribunal cases may allow the public to have confidence in, or raise concerns about the standards the School expects of its employees.

Is disclosure necessary?

41. '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.

42. The Commissioner notes that some information about the outcome of the two employment tribunal cases referred to in the request is publicly available on the employment tribunal website. He therefore considers that, to some extent, this satisfies the legitimate interest in disclosure that has been identified.
43. However, the Commissioner considers that the withheld information would further inform the public about the way in which the School has dealt with the tribunal cases and how it considered the findings of the Tribunal. The Commissioner is not aware of any other means by which the complainant could reasonably obtain the requested information, nor is he aware of any other circumstances where the School would make it available.
44. The Commissioner is therefore satisfied that disclosure is necessary to meet the legitimate interests identified in relation to the School's actions in this matter and, in doing so, to further the public's understanding of how the School handles such matters.

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

45. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
46. 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.
47. 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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

48. The Commissioner considers that people generally have an expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality.
49. In particular, the Commissioner considers that an employee would have a very firm expectation that disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be shared with their peers or disclosed to the wider public. This approach was supported by the Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038, 29 December 2008)*⁴ in which it found that:

“... there is a recognised expectation that the internal disciplinary matters of an individual will be private”.
50. Given the nature of the information and the level of damage and/or distress that disclosure may cause to the data subjects in this case, the Commissioner is not persuaded that the legitimate interests in disclosure override the data subjects' fundamental rights to privacy. The Commissioner is of the opinion that disclosure of the withheld information would tip the balance of transparency and accountability, and would have an unjustified detrimental impact on the privacy rights of the data subjects. In considering this, the Commissioner does not underestimate the damage and distress caused to the affected individuals.
51. Based on the above factors, the Commissioner has determined that the legitimate interest in disclosure is not sufficient to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure of the withheld information would not be lawful.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i282/Rob%20Waugh%20v%20IC%20&%20Doncaster%20College%20\(EA-2008-0038\)%20Decision%2029-12-08.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i282/Rob%20Waugh%20v%20IC%20&%20Doncaster%20College%20(EA-2008-0038)%20Decision%2029-12-08.pdf)

52. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
53. The Commissioner's decision is that the School is entitled to withhold the information under section 40(2) of the FOIA.
54. As the Commissioner has determined that the School has correctly applied section 40(2) to the withheld information he has not gone on to consider the other exemptions it has cited in relation to the information.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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