

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 February 2016

**Public Authority:** Belfast Metropolitan College  
**Address:** 125-153 Millfield  
Belfast  
BT1 1HS

#### Decision (including any steps ordered)

---

1. The complainant has requested information from Belfast Metropolitan College ("the College") in the form of a personnel paper. The College refused to disclose the requested information, citing sections 36, 40 and 42 of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the College has correctly applied the above exemptions to the requested information.
3. The Commissioner therefore requires no steps to be taken.

#### Request and response

---

4. On 14 May 2015, the complainant wrote to the College and requested information in the following terms:  
  
"Please supply the Personnel Paper titled "Lessons Learned" referred to in the minutes of the BMC Resources Committee dated 23<sup>rd</sup> February 2015."
5. The College responded to the complainant on 11 June 2015. It refused to disclose the requested information, citing sections 36, 40(2) and 42 of FOIA as a basis for that refusal.
6. Following an internal review the College wrote to the complainant on 10 July 2015. It stated that it was upholding its original decision.

## Scope of the case

---

7. The complainant contacted the Commissioner on 15 July 2015 to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the College has correctly applied the specified exemptions.

## Reasons for decision

---

9. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and disclosure of that data would be in breach of any of the data protection principles outlined in the Data Protection Act (DPA).
10. The College has withheld part of the requested information (namely the information in Column 1 of the Personnel Paper) citing section 40(2) as a basis for non-disclosure. The Commissioner has considered whether the College has correctly applied section 40(2) of FOIA to that portion of the withheld information.

### Is the withheld information personal data?

11. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

*"...data which relate to a living individual who can be identified—  
(a) from those data, or  
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."*

12. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA.
13. Some of the information sought in the request relates specifically to an individual and her employment in the College. The individual is named personally and would be easily identifiable from the information even if her name were to be redacted.

14. The Commissioner is satisfied that information relating to and individual's employment is personal data in accordance with section 1 of the DPA.

### **Would disclosure breach the data protection principles?**

15. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
16. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

### **Reasonable expectations of the data subject**

17. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
18. The individual in the report is an employee of the College and was the subject of an investigation into alleged fraud. That individual would have expected such information to be kept confidential and not disclosed into the public domain.

### **Potential consequences of disclosure**

19. The individual, not having expected personal information disclosed in relation to an investigation to be disclosed to the wider public, would undoubtedly be distressed should such disclosure take place. Given the nature of the information and the manner in which it was provided, the Commissioner accepts that such loss of privacy could cause damage and distress to the individual concerned.

### **The legitimate public interest**

20. The Commissioner considers that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms or legitimate interests of the individual concerned. The Commissioner has considered

whether there is a legitimate interest in the public (as opposed to the private interests of the complainant) accessing the withheld information.

21. The Commissioner acknowledges that the complainant has an interest in the requested information. However the Commissioner must consider the legitimate public interest in the requested information rather than the interests of the requester.
22. The Commissioner accepts that the information withheld under section 40(2) would be of interest to the complainant, however he considers that this information is personal to the data subject and that there would be no legitimate interest in sharing that information with the wider public. The College has informed the Commissioner that the data subject has received the information in Column 1 of the report following a subject access request to the College. As the complainant requested the information for the purposes of assisting the data subject, the Commissioner considers that these purposes have been served and that there is no legitimate interest in further disclosure into the public domain.
23. On this basis, the Commissioner has determined that disclosure of the requested information would not be in the reasonable expectations of the data subject and therefore it would be unfair processing of information in relation to the individual in question.

### **Section 42(1) of FOIA**

24. The College withheld certain information (in Column 2 of the Personnel Paper) citing section 42(1) of FOIA as a basis for non-disclosure. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. This exemption is subject to a public interest test.
25. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser

acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

26. The Commissioner's Guidance<sup>1</sup> on section 42 makes it clear that information meets the criteria for engaging the category of litigation privilege:
- a. where litigation is underway or anticipated. Where litigation is anticipated there must be a real prospect or likelihood of litigation taking place; it is not sufficient that litigation is merely a fear or possibility;
  - b. the dominant (or main) purpose of the communications must be to give or obtain advice to assist in preparing for litigation;
  - c. and the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
27. The College has stated that the withheld information in Column 2 was provided by the College's legal counsel in relation to legal proceedings which are ongoing. Having had sight of that withheld information, the Commissioner is satisfied that the legal advice was given in order to assist the College in preparing for litigation. The Commissioner is therefore satisfied that the information attracts litigation privilege and that section 42(1) is engaged.

### **Public interest test**

28. Section 42 is, however, subject to the public interest test, which is set out in section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

---

<sup>1</sup> [https://ico.org.uk/media/fororganisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/fororganisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

29. The information can only be withheld if, in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

### **Public interest arguments in favour of disclosure**

30. Having viewed the withheld information, the Commissioner accepts that there is public interest in its disclosure. There is a general public interest in transparency and openness on the part of public authorities, to which the Commissioner does accord significant weight. Disclosure in this case would result in the public being better informed as to the decision-making and investigation processes within the College relating to allegations of the nature set out within the requested information.

### **Factors in favour of maintaining the exemption**

31. However, the Commissioner also believes that there is public interest in allowing the College to obtain legal advice regarding its position where litigation is a realistic possibility. A key reason for the existence of legal professional privilege is to enable a client to obtain confidential advice.
32. It is also necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of legal professional privilege.
33. This inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry*<sup>2</sup>:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (Paragraph 35).*

34. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in

---

<sup>2</sup> EA/2005/0023

favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.

35. Having taken into account the presumption of openness running throughout the FOIA, and the general public interest in public authorities being open and transparent, the Commissioner has considered whether these public interest factors in favour of disclosure outweigh those in favour of maintaining the exemption.
36. As stated above, there is an inbuilt public interest in maintaining legal professional privilege as it is the hallmark of the relationship of trust and confidence which exists between lawyer and client. For litigation, which is ongoing in this case, to be fair and just in respect of all parties, the Commissioner considers that a client needs to be able to obtain confidential advice and to provide his/her lawyer with all information necessary for that lawyer to enter litigation proceedings on a level playing field with the other party or parties. If information subject to legal professional privilege had to be disclosed by public authorities, without any requirement for the other party to disclose similar confidential information, this would lead to unfair proceedings and an inherent unfairness in the justice system. This would not be in the public interest, as the justice system is supposed to be fair to all parties. Any general public interest in disclosure of the withheld information would not be sufficient to outweigh the very strong public interest in maintaining a fair and equal justice system for all.
37. The Commissioner, having considered the arguments both for and against disclosure of the information withheld under section 42(1), has concluded that, in all the circumstances of the case, the factors in favour of disclosure do not outweigh those in favour of maintaining the exemption.

### **Section 36 of FOIA**

38. Section 36(2)(b) and(c) of the FOIA states:  
*'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-...*

*(b) would, or would be likely to, inhibit-*  
*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

*(c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.'*

### **Engagement of section 36**

39. The College has informed the Commissioner that the “qualified person” in this case is its Chief Executive. The Commissioner is satisfied that the Chief Executive is the appropriate qualified person for the purposes of section 36 of FOIA.

40. In order for the Commissioner to determine whether the exemption at section 36(2) is engaged, he must determine whether the qualified person’s opinion is a reasonable one. In doing so, he has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person’s knowledge of, or involvement in, the issue.

41. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

42. The Commissioner’s guidance on section 36<sup>1</sup> explains that information may be exempt under section 36(2)(b)(i) and section 36(2)(b)(ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The guidance



says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.

43. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* arise from disclosure, although the legislation does not define what is meant by the use of the term *otherwise*. The Commissioner considers, however, that the prejudice envisaged must be different to that covered by any other exemption relied upon in section 36(2). Differently constituted Information Tribunals have previously found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.
44. The College has outlined to the Commissioner the issues that were considered by the qualified person in forming an opinion. These are as follows: -
  - The report which is the subject of the requested information was compiled in connection with an investigation. The views of Governors, senior staff, staff involved in the investigation, and legal experts, were sought. Those views were sought in relation to the processes and practices used in the completion of an ongoing employment case.
  - Disclosure at this stage would be likely to seriously prejudice the College's defence in any future similar proceedings.
  - The internal deliberations and decision-making processes of the College require a safe space where issues can be fully explored before decisions are subjected to public debate. Comments and issues within the report remain subject to determination and subject to further legal advice and advice from senior officers. Disclosure would be likely to inhibit the free and frank exchange of views required for this.
  - The issue within the report is the subject of negotiation and, where appropriate, further consultations with those involved. Disclosure would inhibit College officers from providing frank and candid advice and views about the strengths and weaknesses of one course of action or another, which would be likely to cause prejudice to the decision-making process.
45. The Commissioner, having taken into account the issues considered by the qualified person, has concluded that the qualified person's opinion

is reasonable in all the circumstances. He has also, from perusing the requested information, concluded that section 36(2)(b)(ii) is engaged in relation to all information in the report which was withheld under section 36, so has not considered the College's application of sections 36(2)(b)(i) or 36(2)(c) to the relevant withheld information.

46. As the Commissioner has decided that the exemption under section 36(2)(b)(ii) is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC*.<sup>3</sup>

47. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

### **Public interest arguments in favour of disclosing the requested information**

48. There is a general presumption of openness running through FOIA and the Commissioner accords strong weight to the public interest in such general openness and transparency with regard to decisions made by public authorities. The College acknowledges the importance of such general openness and transparency in relation to its decision-making processes.

---

<sup>3</sup> EA/2006/0011 & 0013

49. The College also acknowledged that there is a general public interest in the public being able to see how the College conducts itself when making decisions in contentious areas and in satisfying the public that the officials making these decisions are well-briefed and have a clear understanding of all the facts, so that the process can be conducted fairly and effectively.

### **Public interest arguments in favour of maintaining the exemption**

50. The College has explained that it believes the following public interest arguments favour maintaining the exemption:
51. Disclosure of the information withheld under section 36 would be likely to inhibit the frankness and candour with which the College's officials exchange views and deliberations, which could affect the decision-making process in relation to future employment cases.
52. Disclosure of the information withheld under section 36 could lead to more verbal records of decisions and discussions, which would have an impact upon the fairness of future investigations of this nature.

### **Balance of the public interest arguments**

53. The Commissioner considers there is a strong public interest in openness and transparency, particularly to ensure that decisions such as in this case are made fairly and effectively. This is because it would provide the public with a greater understanding and reassurance of how the College has handled this matter and whether their actions are appropriate, fair and effective.
54. The Commissioner does however consider that such decisions require free and frank discussions and the sharing of staff views. Disclosure of information which would be likely to inhibit the frankness and candour of this decision would not be in the public interest as in turn it would be likely to have a negative impact upon the efficiency of the process.
55. The Commissioner considers that there is a strong public interest in ensuring that whilst options are being considered, those involved such as College officials and legal advisers, do not feel constrained from providing free and frank views on the possible options and courses of action available to them. If those providing the views feel inhibited from being as free and frank as possible, there is a real risk that the views they provide might be lacking in frankness and candour and consequently limit the range of the College's consideration. This would

clearly have a detrimental effect on any future such discussions the College may have about such issues.

56. The Commissioner considers that there is a strong public interest in disclosure of information as it would assure the wider public that the College conducts investigations and makes decisions in a fair and effective manner.
57. However, the Commissioner considers that there is also a strong public interest in allowing the relevant parties' to be able to discuss and deliberate on such matters privately. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) of FOIA was therefore correctly applied in this case.

## Right of appeal

---

58. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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 .....

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**