

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 July 2019

**Public Authority:** Havering College of Further & Higher Education  
**Address:** Ardleigh Green Road  
Hornchurch  
Essex  
RM11 2LL

#### Decision (including any steps ordered)

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1. The complainant, on behalf of the University and College Union at Havering College of Further and Higher Education ("the College"), requested information from the College about a former senior employee's termination of employment. The College provided him with part of the requested information, but withheld part under section 40(2) of the FOIA – third party personal data.
2. The Commissioner's decision is that the College has correctly withheld part of the requested information under section 40(2) of the FOIA.
3. The Commissioner does not require the College to take any steps.

#### Request and response

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4. On 24 October 2018, the complainant wrote to the College and requested information in the following terms (numbers have been added for ease of reference):

*"Following the departure of [name redacted] on 5 October 2018, the Havering UCU Committee is requesting the following information about payment or payments following the end of [name redacted]'s employment with Havering College.*

- 1) *On what basis did [name redacted] leave Havering College: dismissal, retirement, redundancy or another basis?*
  - 2) *Whether [name redacted] has received or will receive in the future, any additional compensation, payment, bonus, earnings, fees or payment of any kind in addition to her contractual entitlement?*
  - 3) *If [name redacted]'s contract included provision for an additional payment of any kind at the end of her employment with Havering College, what was the amount of such payment?*
  - 4) *In the case of redundancy, were any enhanced payment terms agreed beyond [name redacted]'s statutory entitlement?*
  - 5) *Were any additional payments agreed in respect of her pension and will she receive an increased lump or additional payments into her pension pot following her departure?*
  - 6) *Will [name redacted] be carrying out any further work for Havering College on any other basis, for example as a self-employed consultant?"*
5. On 12 November 2018, the College responded and stated that it considered that the information requested in points 1 – 5 of the request was exempt from disclosure under section 40(2) of the FOIA – third party personal data. It also considered that it was not required to respond to point 6 as it was not a request for recorded information and therefore fell outside the scope of the FOIA.
  6. The complainant requested an internal review on 29 November 2018. The College sent him the outcome of its internal review on 20 December 2018. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 5 January 2019 to complain about the way his request for information had been handled. The Commissioner wrote a letter of investigation to the College on 22 May 2019.
8. During the course of the investigation, the College provided responses to the complainant in respect of points 1, 4 and 6 of the request. However, it maintained its position in respect of the outstanding information.

9. The scope of this case has been to investigate whether the College has correctly withheld the information which it holds, falling within the scope of points 2, 3 and 5 of the request, under section 40(2) of the FOIA – third party personal data.

## Reasons for decision

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### Section 40 personal information

10. 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.
11. In this case, the relevant condition is contained in section 40(3A)(a). 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').
12. 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.
13. 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?

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

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

15. The two main elements of personal data are, therefore, that the information must relate to a living person and that the person must be identifiable.
16. 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.

17. 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.
18. In this case, the request does not merely relate to details of a post at the College, but to the termination of employment of a specific individual, who is named in the request. Having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies that individual. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
19. 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.
20. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

21. 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".*

22. 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**

23. 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"*. It must also be generally lawful.

24. 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".*

25. 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:-

- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
26. 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*

27. 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.
28. 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.
29. In this case, the request relates to the circumstances, and financial detail, of the termination of employment of a senior employee of the College. It also relates to the expenditure of public funds. The Commissioner’s view in this case is that there is some legitimate interest in the disclosure of the information to the public as it concerns the expenditure of public funds, and she has gone on to consider the necessity test.

*Is disclosure necessary?*

30. “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.
31. The Commissioner notes that some detail of staffing costs is published annually on the College’s financial statement, but that a statement for the relevant year has not yet been published. At the date of the request, therefore, none of the requested information was in the public domain,

and in any event, the Commissioner considers that the forthcoming financial statement is unlikely to include the level of detail requested.

32. The Commissioner therefore considers that, in order to satisfy the legitimate interest in the disclosure of the information to the public, it would be necessary for the information to be disclosed in response to the request. In her view, there is no less intrusive means by which the information could be made public.

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

33. 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.
34. 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 about the disclosure; and
  - the reasonable expectations of the individual.
35. In the Commissioner's view, a key issue is whether the individual concerned has 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.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. The College stated to the complainant in this case: "*Although [name redacted] held a senior and public facing role in which there is generally a greater level of expectation of accountability and disclosure, the information requested relates to her private life, which forms part of her*

*personnel/HR file in relation to her departure, and she would therefore not expect this information to be publicly disclosed. This is a reasonable expectation for an employee to have”.*

38. The College has also explained to the Commissioner that the terms of the individual’s termination of employment were formalised in a settlement agreement containing a non-disclosure clause.
39. The Commissioner has published guidance<sup>1</sup> on handling requests for information about public authority employees. In her guidance, the Commissioner outlines her approach to assessing the fairness of disclosure.
40. The guidance sets out that: *“although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life”.*
41. The Commissioner is mindful in this case that the relevant individual held a senior post at the College and would, therefore, have had some expectation of transparency concerning the terms of her employment generally. This expectation may, potentially, have extended to details of the termination of that employment.
42. However, in this case, the requested information relates to financial detail about which the College and the individual signed an agreement containing a non-disclosure clause. The Commissioner therefore considers that the individual in this case would have a strong expectation that the information would be held in confidence by the College and not disclosed.
43. The Commissioner has also considered the wording of the request. While the information does relate generally to the financial position of the College (which, as stated, creates some legitimate interest in the disclosure of the information) the Commissioner must weigh this against the rights and freedoms of the individual. The requested information relates to the individual’s previous professional role and remuneration which would, if paid, come from public funds; however, the Commissioner’s view is that it would nonetheless be intrusive to the

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[https://ico.org.uk/media/for%20%20organisations/documents/1187/section\\_40\\_requests\\_f\\_or\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for%20%20organisations/documents/1187/section_40_requests_f_or_personal_data_about_employees.pdf)

data subject to disclose information about the remuneration into the public domain since it would also relate to her financial position after she has left the College. The Commissioner considers that disclosure of the information would intrude on her rights and freedoms.

44. She therefore considers that, due to the nature of the information requested and the expectations of the individual, disclosure of the information would be likely to cause damage and distress to the individual.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of the information to outweigh the individual's fundamental rights and freedoms in this case.
46. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
47. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on separately to consider whether disclosure would be fair and transparent.

#### **The Commissioner's decision**

48. The Commissioner has decided that the College was entitled to withhold the information under section 40(2), by way of section 40(3A)(a). She does not require the College to take any steps.



## Right of appeal

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49. 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](mailto:grc@justice.gov.uk)

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

50. 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.
51. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**