

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2024

Public Authority: The Governing Body of Worcester College
Oxford

Address: Worcester Street, City Centre, Oxford, OX1
2HB

Decision (including any steps ordered)

1. The complainant has requested Worcester College Oxford (the College) to disclose information relating to any donations made by Peter Frankopan and their family between specified dates. The College disclosed some information but refused to confirm or deny whether the remainder is held, citing section 40(5) of FOIA.
2. The Commissioner's decision is that the College is entitled to refuse to confirm or deny holding the information under section 40(5) of FOIA.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 16 June 2023, the complainant wrote to the College and requested information in the following terms:

"For the years 1990–2023, I would like to be provided details on accepted donations, gifts, grants and/or funding that have come from or (to the best of your knowledge) on behalf of the following individuals:

- (a) Peter Frankopan (né Doimi de Lupis);
- (b) Jessica Frankopan (née Sainsbury);
- (c) Sir Timothy Sainsbury;

(d) any other individual with the surname 'Frankopan', 'Doimi de Lupis', 'Detter', or 'Sainsbury'.

For each donation, gift, grant or piece of funding, I would like the following details:

- (1) the name of its donor;
 - (2) the date of its acceptance by the College;
 - (3) its amount;
 - (4) any notes, description, purpose or intended use attached to it."
5. The College responded on 14 July 2023. It disclosed the information except for element (b), for which it refused to confirm or deny holding the information.
 6. The complainant requested an internal review on 9 August 2023. They disputed the application of section 40(5) of FOIA. They stated that in their view the information should be disclosed and commented that they had received similar information from other institutions.
 7. The College carried out an internal review and notified the complainant of its findings on 7 September 2023. It upheld the application of section 40(5) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 September 2023 to complain about the way their request for information had been handled. They dispute the application of section 40(5) of FOIA and believe there is a public interest in knowing what recorded information is held and to have access to that information to understand more closely the basis for Peter Frankopan's promotion within the College.
9. The Commissioner considers his investigation is therefore limited to element (b) of the request and the College's application of section 40(5) of FOIA.

Reasons for decision

Neither confirm nor deny (NCND)

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request.
11. The decision to use an NCND response will not be affected by whether a public authority does or does not, in fact, hold the requested

information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

12. A public authority will need to use the NCND response consistently, over a series of requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. The College has taken the position of neither confirming or denying whether it holds the requested information. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely whether or not the College is entitled to NCND it holds any information of the type requested by the complainant.

Section 40 - personal information

14. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it 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') to provide that confirmation or denial.
15. Therefore, for the College to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request 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.

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

16. Section 3(2) of the DPA 2018 defines personal data as:-

“any information relating to an identified or identifiable living individual”.

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

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 request names specific individuals and asks the College to disclose information relating to any donations, gifts, grants or funding that have come from those individuals during the timeframe specified in the request. Confirming or denying if any information is held will disclose information relating to that individual – it would either be saying we hold information and therefore that an individual has made such contributions or that we do not hold any information and therefore from this it can be ascertained that an individual hasn't. Either way, this is information relating to the named individual; information of which they are the focus.
20. For these reasons, the Commissioner is satisfied that if the College confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
21. The fact that confirming or denying whether the requested is held would reveal the personal data of a third party does not automatically prevent the College from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
22. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

23. Article 5(1)(a) UK GDPR states that:-

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

24. In the case of a 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 – or as in this case the College can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

25. 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

26. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

“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”¹.

27. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

¹ 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 2018) 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”.

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

28. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

29. 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.
30. The Commissioner notes the complainant has concerns over the employment of Peter Frankopan and it appears from their request that they may be of the view that this may have been influenced in some way by his family connections. The Commissioner notes this is a legitimate interest to the complainant. He also recognises that there is a legitimate interest more generally in donations that are made to such institutions – where these come from and at what level. There is a legitimate interest therefore in knowing if the requested information is held or not.

(ii) Is confirming whether or not the requested information is held necessary?

31. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner is not aware of any other, less intrusive, means of meeting those legitimate interests. Although he notes that the College does have a policy relating to donations and what information is routinely published with the consent of the individual and this will go

some way to meeting the legitimate interests identified regarding this type of information, generally speaking.

(iii) 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 confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the College 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, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
34. The College explained that there is no specific policy relating to donations from relatives of staff, nor for their disclosure under FOIA. However, in general the College gives weight to public interest for donations above £25,000 but each instance is considered on a case-by-case basis. The College also seeks consent from donors to disclose any information other than donor name, programme support and gift band (e.g. £25,000 to £49,999). It seeks the consent from its donors to print their name and year group in reports and its annual 'Record'.
35. It said that it does not have the named individuals' consent to either confirm or deny that they had, or had not, made any donation to the College. It would therefore breach their data protection rights to do so and disclose whether or not they have made any donations, thereby making reference to their economic, cultural and social identity.
36. The College confirmed that unlike Peter Frankopan and other members of the Sainsbury Family, Jessica Frankopan has no connection to the College as either a current or former member. They are the spouse of a Senior Research Fellow and hold no remunerated or voluntary positions within the College. It explained how the complainant is concerned about the influence of Peter Frankopan's position within the College. Peter Frankopan is one of 16 Senior Research Fellows who is a member of the Senior Common Room and is not one of the 52 trustees of the College and does not serve on the Governing Body. It therefore considered Peter Frankopan's position and that of their spouse in relation to this request as unexceptional. Its position is firmly that the rights of any data subject who is an ordinary member of the College without trustee status would outweigh any legitimate interests identified.
37. It appears to the Commissioner that the College's established approach to publication of donation information is very much dependent upon the

donor's consent, whether the donation is over £25,000 or not and whether there are any exceptional circumstances in any given case that would warrant public transparency. Turning to consent, if the donor does not consent to certain information being published, it appears this is respected unless the status of that individual warrants that transparency or there are exceptional circumstances. It is therefore fair to say that Jessica Frankopan would not expect any information (if indeed it is held, and the Commissioner does not know either way) to be disclosed about whether or not they have made a donation to the College to be published, unless they provided their specific consent. They would hold a reasonable expectation of privacy and confidentiality either way, unless they specifically consented to disclosure of the requested information.

38. Confirming or denying if the requested information is held, without their consent, would be disclosing private and personal information. Without consent, either way, it would be against their reasonable expectations and the College's established position on publication of such information and would cause some level of distress and personal intrusion.
39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
40. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the College was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
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