

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2024

Public Authority: The West of England Combined Authority
Address: 70 Redcliff Street
Bristol
BS1 6AL

Decision (including any steps ordered)

1. The complainant requested from The West of England Combined Authority ('WECA'), work diaries relating to the Interim Chief Executive of WECA, and other information associated with his employment in various roles within WECA. WECA refused the request on the basis that section 36(2)(c) (prejudice to the effective conduct of public affairs), section 43(2) (commercial interests), 38(1)(b) (health and safety), and section 40(2) (personal data) applied.
2. The Commissioner's decision is that WECA was not correct to withhold the information under section 36(2)(c) and section 43(2), however it was correct to withhold some information under section 40(2). He has not found it necessary to consider the application of section 38(1)(b).
3. The Commissioner requires WECA to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information, subject to appropriate redactions of personal data under section 40(2) of FOIA as outlined within this decision notice.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 September 2023, the complainant wrote to WECA and requested information in the following terms:

"I would be grateful if you would provide the work diaries for Richard Ennis's employment as :

The director of investment and corporate services;

Acting interim chief executive and director of investment and corporate services; and

Acting interim chief executive.

I would also be grateful if you would provide the recorded information relating to Mr Ennis's appointment to each role above. This might include, for example, tendering processes for the third-party company involved, interview panels, letters of appointment, emails between the authority and Mr Ennis confirming the appointments and so on."

6. WECA responded on 22 January 2024. It withheld the requested information on the basis that section 36(2)(c) applied to the requests for the diaries, and section 43(2) applied to the remainder of the requested information. WECA also applied section 40(2) to relevant information falling within the scope of both parts of the request.
7. WECA did not provide any response to the complainant's request of 23 January 2024 asking it to carry out a review of its decision.

Scope of the case

8. The complainant contacted the Commissioner on 20 March 2024 to complain about the way their request for information had been handled.
9. The diaries are held in a Microsoft Outlook calendar format. WECA argues that disclosing these would disclose details about the general working patterns of the CE, and personal details regarding him, his family, and his private life. WECA argues that a disclosure of information such as when he is away from home, or working in the office, would allow a pattern to be identified, and that disclosing, for instance, times when he is not at home may cause distress and safety issues to him and to members of his family.

10. The complainant, however, has accepted that personal information relating to the CE's home and private life could be redacted from the work diaries in question. This information can therefore be redacted from the work diaries as it now falls outside the scope of the complainant's request for information. As such the Commissioner has not found it necessary to consider the council's application of section 38(1)(b) to the work diary, which it sought to apply during the course of the Commissioner's investigation.
11. The following analysis covers whether WECA was correct to withhold the information under the exemptions it has cited.

Reasons for decision

A) Work diaries for Richard Ennis

Section 36(2) – prejudice to the effective conduct of public affairs

12. WECA applied section 36(2)(c) to part 1 of the complainant's request for information; the work diaries of Richard Ennis in his various specified roles.
13. Section 36(2)(c) protects information if its disclosure: "in the reasonable opinion of a qualified person...would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."
14. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to:
 - a. ascertain who acted as the Qualified Person (QP);
 - b. establish that an opinion was given by the person;
 - c. ascertain when the opinion was given; and
 - d. consider whether the opinion was reasonable.
15. WECA has provided evidence that it sought the advice of the Monitoring Officer, in their position as the QP, on 18 January 2024. It explained that the QP is fully familiar with the form and likely content of the calendar, which is wholly similar to the calendar of the other senior Statutory Officers in the Combined Authority (which includes the Qualified Person as Monitoring Officer).
16. The Commissioner is satisfied that the WECA's Monitoring Officer is authorised as the QP under section 36(5) of FOIA.

17. The Commissioner must therefore consider whether the QP's opinion is reasonable. When determining whether the opinion is reasonable, 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.
18. The QP's explanation was brief. It said that section 36(2)(c) applies on the basis that senior officers should be able to keep work diaries private and confidential to inform and support the proper and effective discharge of their professional duties for the benefit of the public.
19. The QP found that a disclosure of the information *would be likely* to cause prejudice.
20. WECA added further context to the decision. It explained that the work diaries contain many examples which could be used to understand the general work pattern of the Chief Executive (CE). It said that the work diary also contains personal information of the CE (and other officers and private individuals, including members of CE's family) which it considers exempt from disclosure under section 40(2). It argued that the CE and the other individuals concerned have a legitimate expectation that these details will not be disclosed.
21. It further argued that a disclosure of information, such as when the CE was not at home, would be likely to be prejudice the safety of members of his family.

The Commissioner's analysis

22. The Commissioner has reviewed the withheld information, in conjunction with WECA's arguments. The Commissioner notes that WECA has applied section 36(2)(c) to the entirety of the information contained within the diaries.
23. The Commissioner firstly notes that the WECA's representations to him do not explain why a disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs. It has only explained why a disclosure would be likely to affect the CE, members of his family, and potentially other WECA officers. It has not provided arguments explaining why a disclosure would be prejudicial to the effective working and functions of the authority itself, which is the intended purpose behind the exemption.
24. Additionally, WECA has seemingly applied section 36(2)(c) to the information on the basis that some elements of the diary will disclose information which would allow working patterns of individuals to be discerned, and argued that health and safety, and personal data issues

would arise as a result of this. This reasoning would be more applicable to sections 38 and 40, than to section 36(2)(c).

25. Furthermore, the diary itself contains many entries which do not give rise to such issues. WECA does not appear to have made any distinction between the content and sensitivity of the different entries in the diary information. No explanation has been provided that is relevant to all of the entries in the diary.
26. The Commissioner also notes that WECA has not provided any public interest arguments supporting the exemption in section 36(2)(c) being maintained.

The Commissioner's conclusions

27. The Commissioner's guidance on the application of section 36 states, as regards the question of whether the QP's opinion is reasonable:

"Where the ICO is considering a complaint about information withheld under section 36, we will consider all relevant factors to assess whether the opinion was reasonable. These may include the following:

*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."*¹

28. Having had regard to the explanation made in support of the QP's opinion, in conjunction with WECA applying the exemption so widely to a substantial volume of information, the Commissioner is not satisfied that the prejudice envisaged is related to section 36(2)(c).
29. The Commissioner emphasises that responsibility for demonstrating the correct application of an exemption lies with the public authority. In this case that meant explaining how the opinion of the QP was reasonable. Whilst WECA has set out some concerns around impacts on specified individuals, it has offered no relevant explanation for the QP's opinion. In the absence of such an explanation, the Commissioner finds that the opinion of the QP was not reasonable and hence that 36(2)(c) is not engaged.

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#whatisa>

Section 40 - personal information

30. This reasoning covers whether WECA is entitled to rely on section 40(2) of FOIA to refuse to provide the withheld information.
31. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
32. Section 3(2) of the Data Protection Act 2018 defines personal data as:
 “any information relating to an identified or identifiable living individual.”
33. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
34. In this case, WECA has withheld the work diaries of a named individual, the CE of WECA. The Commissioner is satisfied that this information relates to and identifies the CE and so he considers the withheld information to be personal data.
35. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:
 “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
36. 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 if to do so would be lawful, fair and transparent.
37. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

The complainant's position

38. The complainant argues that the work diaries cannot be considered private and confidential. A record of a chief executive or senior director attending a WECA meeting, for example, would be minuted elsewhere, publicly, and cannot be considered private and confidential information as it is a work diary.

39. The complainant further confirmed to the Commissioner that they accept that if there is information that is genuinely private and relates to the diary holder's private life, then this can be redacted. However, the complainant argued that information relating to senior officers carrying out their daily work, unless commercially confidential, should not be redacted.
40. The Commissioner recognises that the public has a legitimate interest in obtaining a greater understanding of the role and functions of the CE in the circumstances of this case. The CE role has acted in a number of senior roles within WECA as a decision maker, making strategic decisions which involve the use of public money, and setting and prioritising the functions of WECA in regard to the roles he was in.
41. The Commissioner notes that the complainant does not seek diary entries which would identify home or private issues relating to the CE. He seeks only the entries which relate to the specified roles which the CE carried out within WECA.
42. The Commissioner therefore considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that interest.

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

43. 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.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. WECA's expressed concerns related to the information providing details of the private life of the CE. As noted, the complainant has accepted that this information can be redacted and as such this now falls outside the scope of the request.
46. However, the majority of the entries within the diaries do not highlight the home and private life of the CE. They relate to the CE carrying out his roles. The public has a legitimate interest in understanding how the CE carries out his role and the sort of meetings and tasks he is required to undertake. This would allow a better overall understanding of the relevant roles which the CE has undertaken.

47. The roles are senior officer roles, where the CE would be acting in a strategic decision-making position, with an important role in delivering the functions of the authority for the people it serves. The Commissioner considers that there is a strong onus that such roles are carried out as transparently as possible, and that there would be an associated expectation that that is the case.
48. In this case, the CE has been hired by WECA via a contract with a third party. This adds an additional expectation of transparency to allow taxpayers to scrutinise WECA's governance and financial decision making in hiring a senior officer in this way.
49. The Commissioner also considers that the CE would reasonably have an expectation that they would need to be as transparent to the public as possible about the work they carry out. The complainant noted that many council meetings will be minuted and published on WECA's website. As a result, there would already be publicly available information recording the CE's attendance at these meetings.
50. The Commissioner therefore finds that the legitimate interests identified outweigh the fundamental rights and freedoms of the CE for this type of information.
51. As regards any information within the diaries which relate to third parties, the Commissioner considers that the identities of individuals who do not work for WECA and are not senior business or organisation representatives should be redacted where it is appropriate to do so under section 40(2) of FOIA. They would have no expectation that their personal data would be disclosed via an FOI request, and there is little legitimate interest in the disclosure of their identities.
52. Additionally, where entries relate to meetings with non-senior WECA staff, members of the public, or representatives of other organisations, any information identifying those individuals may be redacted where it is appropriate to redact this information under section 40(2) of FOIA.
53. For the remainder of the entries, based on the above factors, and other than where highlighted above, the Commissioner has determined that the legitimate interests identified outweighs the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.
54. Other than where highlighted above, therefore, the Commissioner's decision is that WECA is not entitled to rely on section 40(2) of FOIA to refuse to provide the information WECA withheld under section 40(2).

b) the request for copies of documents relating to Richard Ennis's employment.

Section 43(2) – Commercial interests

55. The following reasoning considers whether WECA is entitled to rely on section 43(2) of FOIA to refuse to provide the withheld information falling within the scope of part 2 of the complainant's request for information.
56. Section 43(2) provides that – “Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”
57. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers that three criteria must be met:
 - a) Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - b) Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and
 - c) Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

(a) Does the information relate to a person's commercial interests?

58. The term ‘commercial interests’ is not defined in the FOIA, however, the Commissioner considers that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
59. The withheld information relates to a contract and communications between the third party and WECA regarding the employment of the CE on a commercial basis. WECA employed the CE in his roles via a contract with the third party.

60. The Commissioner is therefore satisfied that the issues highlighted by WECA relate to the parties' commercial interests.

(b) Does a causal relationship exist between the potential disclosure and the prejudice which the exemption is designed to protect

61. The Commissioner has reviewed the withheld information, in conjunction with WECA's arguments.

62. In response to the Commissioner's questions WECA argued that:

"The requested information is exempt from publication under Section 43(2) of the Freedom of Information Act. The requested information is exempt under this paragraph because its disclosure under FOIA would be likely to prejudice the commercial interests of the Authority, the Interim Chief Executive and the third-party agency, who are each operating in a commercial services market with limited supply. Releasing this information would be likely to prejudice the Authority's ability to negotiate and contract confidentially and cost-effectively in the aforesaid commercial services market."

63. This was the sole argument which WECA provided to the Commissioner to demonstrate why the exemption in section 43(2) of FOIA is engaged. Its response to the complainant's request was equally as brief.

64. WECA has seemingly applied section 43(2) to the information simply on the basis that it relates to the contract and terms between itself and the third party regarding the interim chief executive, as well as emails and correspondence between the parties regarding this.

65. No description has been given as to why the content of the information is commercially sensitive, and no clear explanation has been provided in respect of the claimed prejudice and how, in the circumstances of this particular matter, that prejudice would be likely to occur in respect of the various types of information that WECA has applied the exemption to.

66. The Commissioner also notes that WECA has not provided any evidence to indicate that it has consulted with the third parties, or that its arguments are based on knowledge of the third parties' concerns. The Commissioner does note, however, that the contract stipulates that the information is being provided in confidence.

67. Given the cursory arguments made by the council, in conjunction with WECA applying the exemption so widely to the withheld information, the Commissioner is not satisfied that WECA has demonstrated the prejudice claimed.

68. The lack of detail in the council's submissions suggests to the Commissioner that it has not carefully considered this matter to the necessary degree, and as a result it has sought to apply the exception on a general basis.
69. The Commissioner emphasises that responsibility for demonstrating the correct application of an exemption lies with the authority concerned.
70. The Commissioner does not consider that WECA has provided sufficient evidence or arguments that a disclosure of the information would be likely to cause the prejudice it argues would occur, and he therefore concludes that section 43(2) is not engaged.

Right of appeal

71. 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

72. 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.
73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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