

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 2 November 2016

Public Authority: Southern Regional College
Address: Patrick Street
Newry
BT35 8DN

Decision (including any steps ordered)

1. The complainant has requested a report of an investigation conducted into matters he had raised under Southern Regional College's whistleblowing policy. The College refused the request in reliance on the exemptions at section 40(1) and section 40(2) of the FOIA. The Commissioner's decision is that the College was entitled to refuse the request. No remedial steps are required.

Request and response

2. The complainant requested the following information from the College on 3 February 2016:

"A copy of the report of the investigation carried out by the Investigating Officer into the disclosures made by me, [name of complainant] in good faith and in the public interest under SRC's Whistleblowing Policy and Assessment Malpractice Policy on 8 October 2015 and 5 November 2015 concerning assessment malpractice, supervisory negligence and procedural impropriety committed by [details of allegation removed to avoid identifying individuals]".

3. The College responded on 24 January 2016, advising that the request was being refused under sections 40(1) and 40(2) of the FOIA.
4. The complainant requested an internal review on 9 March 2016. The College responded on 8 April 2016, upholding its original refusal.

Scope of the case

5. The complainant contacted the Commissioner on 27 June 2016 to complain about the way his request for information had been handled. The complainant argued that he was entitled to receive the report, and said that withholding it from him was a detriment to him. The complainant said that, given that the investigation had not found any evidence of wrongdoing, there was a strong public interest in releasing information to provide a full and transparent overview.
6. The Commissioner's investigation therefore focused on whether the College was entitled to rely on the exemptions at section 40(1) and section 40(2) of the FOIA.

Reasons for decision

Section 40(1): personal data of the applicant

7. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because there is a separate legislative access regime for an individual's own personal data, namely the right of subject access under section 7 of the DPA. The exemption is absolute, which means there is no requirement to consider the public interest.
8. The College cited the exemption at section 40(1) in respect of the requested information to the extent that it comprised personal data of the complainant.
9. The Commissioner has undertaken a separate consideration of the College's handling of the request in her capacity as regulator of the DPA. This does not fall within the scope of this decision notice because the DPA provides a separate and distinct access regime. The Commissioner can say though that she is satisfied that the College was entitled to cite the exemption at section 40(1) in respect of information that is the complainant's personal data.

Section 40(2): third party personal data

10. Section 40(2) of the FOIA provides that third party personal data is exempt from disclosure into the public domain if its disclosure would contravene any of the data protection principles set out in Schedule 1 to the DPA. The College cited section 40(2) in respect of the withheld information that was not the complainant's personal data.

Is the information personal data?

11. Section 1(1) of the DPA defines personal data 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 intentions of the data controller or any other person in respect of the individual.”

12. In this case the complainant has specifically requested a report dealing with matters he raised about two members of staff. Having examined the withheld information the Commissioner is satisfied that these individuals could be identified from the information in question by virtue of their names, job titles and other information contained in the report. Therefore the Commissioner is satisfied that the withheld information does comprise third party personal data of individuals.

The first data protection principle

13. In its refusal notice the College referred to the first data protection principle, which requires that personal data be processed fairly and lawfully. When considering the first principle the Commissioner will generally look to balance the reasonable expectation of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency. The Commissioner has also published guidance¹ on handling requests for personal data relating to public authority employees.

Reasonable expectation of the data subject(s)

14. The Commissioner is of the view that public authority employees should expect to have some personal information disclosed (for example, salary bands) as they are paid from the public purse. However she considers that information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy. This has been

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https://ico.org.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information#exemptions

supported by the Information Tribunal's finding in the case of *Waugh v Information Commissioner and Doncaster College*:²

"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."

15. The College said that the individuals who were named by the complainant would be entitled to expect that their personal data would not be disclosed into the public domain. The College said that it was established practice that such matters would be handled confidentially, and that information contained in the report would only be used for the purpose of the investigation.
16. The Commissioner accepts that individuals who are subject to internal investigation, or who provide information as witnesses, are generally entitled to expect that their personal information will not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with such investigations. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
17. In light of the above the Commissioner accepts the College's argument that any individual involved in an investigation of the description set out in the request, would have a reasonable expectation of confidentiality.

Consequences of disclosure to the individuals

18. The College said that disclosure of the withheld information would be likely to cause unnecessary and unjustified distress to the individuals. It would inform the public that the individuals had been the subject of an investigation, which would be unfair given that no evidence of wrongdoing was found.
19. The College also pointed out that the individuals concerned had refused consent for their information to be disclosed. Although consent is not a prerequisite for disclosure, the Commissioner is of the view that it is often good practice to consult with individuals who would be affected. This provides individuals with an opportunity to express any concerns they may have about disclosure.

² Appeal no EA/2008/0038

20. Again the Commissioner accepts as reasonable the arguments put forward by the College. The individuals in question have been found to have committed no wrongdoing, but disclosure into the public domain of information relating to allegations would be likely to encourage speculation, which would be unfair to the individuals.

General principles of accountability, transparency and legitimate public interest in disclosure

21. The Commissioner appreciates that there is a general public interest in accountability and transparency. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by disclosure of the withheld information.
22. The complainant has repeatedly argued that there is a strong public interest in disclosure of the withheld information. Despite the fact that his allegations of wrongdoing were investigated and not upheld, he considers that it is necessary to publish the investigatory report. The complainant remains of the view that wrongdoing did in fact occur, and considers it important to know why the College did not uphold his concerns despite the information he provided.
23. The Commissioner acknowledges the complainant's argument that it may still be fair to disclose information where there is an overriding public interest in disclosure. The Commissioner notes that she has had the benefit of inspecting the withheld information, but does not consider that there is any such overriding public interest in this case that would justify causing distress to the individuals concerned. The Commissioner is of the view that there is a stronger public interest in protecting the privacy rights of individuals who have been found to have done nothing wrong. The College has provided the complainant with the outcome of the investigation, and has further provided him with his own personal data. Therefore the Commissioner considers that the College has provided the complainant with all the information that he, as the whistleblower, is entitled to receive. The Commissioner does not accept that the public is entitled to receive details of the investigation, and in any event finds that the public interest in the matter is extremely limited, for example in terms of the size of the public authority and the number of people affected.
24. For the reasons set out above the Commissioner finds that disclosure of the withheld information in this case would be unfair to the individuals who were the subject of the investigation. Disclosure would contravene the first data protection principle, therefore the Commissioner finds that

Reference: FS50635346



the College was entitled to refuse the request on the basis of section 40(2) of the FOIA.

Right of appeal

25. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Sarah O’Cathain
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