

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 25 May 2023

Public Authority: Belfast Metropolitan College
Address: Titanic Quarter Campus Level 4, Room 17
7 Queen's Road,
Belfast BT3 9DT

Decision (including any steps ordered)

1. The complainant has requested a copy of communications referenced in minutes of a meeting held on 6 December 2021, and a copy of a report referenced in minutes of a meeting held on 14 March 2022.
2. The Commissioner's decision is that Belfast Metropolitan College ("the College") has correctly cited section 36(2) in response to the complainant and the balance of public interest favours withholding the requested information.

Request and response

3. On 1 July 2022, the complainant wrote to the College and requested information in the following terms:

"Copy of all the communication from Management to the Governing of the indemnification in such cases. This referenced in the Human Resource Committee Governing Body Minutes on the 6th December 2021. The communication should be in the possession of [redacted].

'The committee asked management to consider a lesson learnt review in light of a recent closure in a long running case. Management will communicate to the Governing Body the continuing indemnification such cases.'

Copy of the report. This referenced in the Human Resource Committee Governing Body Minutes on the 14th March 2022. The communication should be in the possession of [redacted].

'The committee commended management for the structure and content in the report and the positive work that had been carried out in relation to the management of employment relation cases'."

4. The College sought clarification of the request on 4 August 2022 and this was received on 9 August 2022. The College then responded on 5 October and refused to provide the requested information citing section 36(2) FOIA as its basis for doing so. It provided an internal review on 13 January 2023 where it disclosed a copy of the report redacted by virtue of section 40(2), but maintained its reliance on section 36 for the remaining withheld information.

Scope of the case

5. The Commissioner confirmed with the complainant that the focus of his investigation would be the application of section 36.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

6. Section 36 FOIA states that information is exempt where, in the reasonable opinion of "a qualified person" (QP), disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
7. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person.
8. The College provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) and 36(2)(c) submission to the QP.
9. The College sought this opinion from the Principal and Chief Executive, Louise Warde Hunter, on 28 September 2022 and it was provided on 3 October 2022.
10. In the specific circumstances of this case, the Commissioner is satisfied that section 36 can be engaged on the basis of this opinion. From the evidence he has seen, he accepts that the information that the QP considered when they gave their opinion included the information that falls to be considered under section 36 in this case.
11. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the QP's opinion was a reasonable one.

12. 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 QP'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 QP's position could hold. The QP's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
13. The Commissioner considers that the exemptions at section 36(2) are about the **processes** that may be inhibited, rather than focussing only on the content of the information.
14. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.
15. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
16. With regard to section 36(2)(c), the Commissioner's guidance states:

"..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".
17. The College has argued that disclosure would be prejudicial to the effective conduct of public affairs and that its release would have a chilling effect on the College's relationship with key stakeholders. The Commissioner is therefore satisfied that the exemptions are properly engaged.
18. The Commissioner has therefore gone on to consider the public interest test.

Public interest test – the College's position

19. Section 36 is subject to the public interest test. With regard to sections 36(2)(b)(i) and (ii), the Commissioner notes that the College considers that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views.
20. The QP concluded that the disclosure of the communications requested could inhibit senior management's ability to express themselves openly and honestly on matters which are the subject of deliberation and result in a chill factor for future engagement.
21. They also considered that senior management need to be able to express themselves candidly and there is a risk that disclosing communications of this nature would remove the safe environment for deliberation and shut down discussions that management need to have as a team not only in relation to the current and ongoing issue but also in relation to future discussions.
22. Disclosure therefore carries an unacceptable risk regarding the provision and potential quality of advice and the attendant deliberation and discussions. Ultimately, this could lead to poorer decision making.
23. This is because the College considers that disclosure of this information is not in the public interest as it would prejudice the College's ability to offer an effective public service and to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.
24. In relation to the public interest test, the College stated that it takes its transparency and accountability obligations seriously. However, at the time of the request, this matter remained live as the progression of a "lessons learned" review remains ongoing."
25. With regard to section 36(2)(b)(ii) the QP considered disclosure could potentially have a negative impact on its ability to obtain advice and guidance from external third parties in the future such as the Department for Education.
26. The QP concluded that disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. They considered that disclosing the information would have adverse effects on the open and honest culture within the College and could potentially lead to behaviours that are contrary to the spirit of openness and transparency.
27. In relation to the request for a 'Copy of the report,' the QP considered the disclosure of the information could prejudice the effective conduct of public affairs. The document deals with strategic matters and contains

commercial in confidence material which if it made its way into the public domain could be deleterious to the effective running of the organisation and to employee relations. The QP considered this to carry an unacceptable level of risk.

28. The QP concluded that the emails were specifically in relation to senior management seeking advice regarding organisational procedures and disclosure of these communications could inhibit senior management's ability to express themselves openly and honestly on matters which are the subject of deliberation and result in a chill factor for future engagement. The QP considered that disclosure therefore carries an unacceptable risk regarding the provision and potential quality of advice and the attendant deliberation and discussions, ultimately, this could then lead to poorer decision making.

Balance of the public interest

29. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the College's ability to carry out its work. As to how much weight this should carry in the balance of the public interest, the question here is what the severity, extent and frequency would be of the prejudice identified by the qualified person.
30. While it might be towards the lower end of the scale, disclosing the requested information is held would be likely to cause the prejudice under section 36(2)(b)(ii) is, in the Commissioner's opinion, a credible position. The Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the qualified person would be of significance and due weight is therefore accorded to the QP's opinion.
31. When considering the application of this exemption the College considered the public interest in disclosure demonstrating openness and transparency of process. There is a need for the College to have a safe environment in which to have free and frank internal discussions and for the internal thinking space of the organisation to be protected. There is also a need to allow policy and decision makers to receive and debate advice and for advisers to give free and frank advice. When considering chilling effect arguments, the Commissioner must take into account factors like: the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
32. At the time of the request, the College has indicated that it was related to a live matter.
33. In addition to the general public interest in public authorities being open and transparent, the Commissioner recognises there is some public interest in disclosing correspondence between the College and stakeholders, and officials.

34. The Commissioner recognises that it is important for the College to be able to rely on the professional views of its advisers. There is a need to ensure that communications from these parties are candid, open and honest when determining issues that may affect the College.
35. In relation to the withheld email exchanges, it is of importance that the College can build, develop and maintain positive, trusting and open working relationships and disclosing this information is likely to undermine this trust and hinder future exchanges.
36. Although disclosing the correspondence would be unlikely to completely deter advisers and stakeholders from providing their view, there is a risk that their professional reputations may be damaged if such exchanges went into the public domain given that there were still ongoing issues being addressed at the time of the request. This may lead to advice or opinions given being less open and honest and such diluted advice and opinions would be likely to prejudice the information provided to the College and reduce its effectiveness.
37. Whilst there are arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the College being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision.
38. As such the Commissioner considers that there is a stronger public interest in ensuring that public authorities, such as the College is able to engage freely and frankly with stakeholders and officials to consider issues and take action where the use of public funds are involved. In light of this the Commissioner has concluded that the public interest favours maintaining the exemption at section 36(2) and the requested information should be withheld.

Other matters

39. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
40. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the

complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

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: 0300 1234504
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.

Signed

Susan Duffy
Senior Case Officer
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Wycliffe House
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