

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 5 September 2019

Public Authority: The Governing Body of the University
of South Wales

Address: freedomofinformation@southwales.ac.uk

Decision (including any steps ordered)

1. The complainant requested copies of minutes of the Board of Governors meetings and a number of confidential annexes referred to in earlier minutes of meetings of the Board. The University applied sections 22, 36 and 43 to the information. The complainant was unhappy with the decision of the University of South Wales ('the University') to withhold the confidential annexes. During the course of the Commissioner's investigation the University disclosed some of the information it originally withheld. The Commissioner's decision is that the University correctly applied sections 36, 40(2) and 43 to the remaining withheld information. She does not require any steps to be taken.

Request and response

2. On 28 May 2018 the complainant wrote to the University and requested information in the following terms:

"I have been looking for Minutes of the Board of Governors of USW on your website and cannot see anything after March 2017. Could I formally request copies of subsequent Minutes?"

I also note that earlier Minutes refer to confidential annexes relating to the RWCMD. Could I ask for copies of any such confidential annexes (or

such annexes suitably redacted) for the period from 1 January 2016 to date?".

3. The University responded on 2 July 2018 and stated that it considered section 22 of the FOIA applied to the minutes of the meetings of its Board of Governors. The University also withheld the confidential annexes requested under section 36(2) and 43(2) of the FOIA.
4. On 2 July 2018 the complainant requested an internal review of the University's decision in relation to the request for copies of confidential annexes. He also asked the University to direct him to where the minutes of the Board of Governors could be found.
5. On 10 July 2018 the University provided the complainant with a link to the relevant section of its website where he could find the published minutes.
6. On 9 August 2018 the University provided the outcome of its internal review and upheld its decision that the confidential annexes were exempt by virtue of sections 36(2)(b)(ii), 36(2)(c) and 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 25 August 2018 to express his dissatisfaction with the University's handling of the request, and specifically its decision to withhold copies of the confidential annexes he requested.
8. During the course of the Commissioner's investigation the University disclosed redacted copies of the confidential annexes but it maintained that the remaining information was exempt under sections 36(2)(b)(ii), 36(2)(c) and 43 of the FOIA. It also introduced reliance on section 40(2) in respect of a small amount of third party personal data.
9. In light of the above, the scope of Commissioner's investigation is to determine whether the University should disclose the remaining withheld parts of the annexes requested.

Reasons for decision

Section 36 – prejudice to the effect conduct of public affairs

10. Section 36(2)(b (ii) provides that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that

information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.

11. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who the qualified person is for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
12. The qualified person for the University is the Vice Chancellor Professor Julie Lydon and the University has confirmed that Professor Lydon gave her reasonable opinion in her capacity as the qualified person that sections 36(2)(b)(ii) and 36(2)(c) apply in this case. The University applied both limbs of section 36 to the same information.
13. The University explained to the Commissioner that on receipt of the request, based on the content of the withheld information and the fact that they were expressly marked as 'confidential', its Compliance Manager considered that the section 36 exemption might have been applicable, and discussed the matter orally with the qualified person on 12 June 2018. A note was made of this discussion confirming that the qualified person considered the information should be withheld as "*the matter was 'live' and ongoing and unresolved at board level*".
14. The University confirmed that there is no other formal recording of the opinion of the qualified person that was given on receipt of the request. However, during the Commissioner's investigation the University retrospectively completed the Commissioner's suggested template¹ for authorities to use to record the qualified person's opinion. The University explained that it was amending its internal procedures to ensure that contemporaneous records of the qualified person's opinion are created at the outset in the future.

¹ https://ico.org.uk/media/for-organisations/documents/1176/section_36_record_of_the_qualified_persons_opinion.doc

15. The University's refusal notice claimed that disclosure "*would*" prejudice the effective conduct of public affairs. However, at the internal review stage it revised its position and confirmed that it was relying on the lower threshold of prejudice ie "*would be likely*".
16. The withheld information in this case is contained within two confidential appendices and relates to the relationship between the University and the Royal Welsh College of Music and Drama ('RWCMD'). The RWCMD is a wholly owned subsidiary of University and both institutions have independent charitable status. The withheld information also contains details of the financial position and funding and governance arrangements of the RWCMD.

Section 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purposes of deliberation

17. The University contends that good decision making requires its Board of Governors to be able to discuss matters freely and openly. It pointed out that there is public scrutiny of its Board of Governors as it routinely publishes minutes of meetings of the Board. However, the University stated that there are times when it requires "*a safe space to explore and challenge controversial and difficult issues appropriately so that they are able to take appropriate action*". As such, its normal practice is to include any particularly sensitive information within confidential appendices to minutes, which are not published.
18. The University has argued that the withheld information contains candid views of the attendees and include sensitive information about the University and the RWCMD's commercial and financial position. It considers that those participating in such discussions should be able to do so freely and frankly, without the fear of disclosure. The University contends that the prospect of disclosure would be likely to suppress the freedom and openness in which these views are shared, which would inhibit future discussions and lead to a prejudicial effect on decision making.

Section 36(2)(c) - otherwise prejudice the effective conduct of public affairs

19. The University's position in terms of its application of section 36(2)(c) are two fold –
 - a. "*The threat of disclosure of confidential appendices could lead to a chilling effect not only in the free and frank exchange of views (as set out in its arguments relating to section 36(2)(b)(ii)), but also in respect of minute-taking. If highly business sensitive and confidential information, such as that in the Withheld*

information, were routinely disclosed it would be likely to result in shorter and less detailed minute-taking". The University contends that this could lead to lower quality-decision making and prejudice the effective conduct of its public role.

- b. Disclosure would be likely to prejudice the financial position of the University itself and RWCMD.

Is the qualified person's opinion reasonable?

20. In reaching a view as to whether section 36(2)(b)(ii) is engaged in this case the Commissioner has taken into account the fact that the documents in question were intended for a limited audience and were not intended for wider dissemination. The documents contain content that could be fairly characterised as free and frank and that relates to the provision of advice and / or the exchange of views.
21. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the remaining information within the confidential appendices would inhibit the process of exchanging views.
22. Having examined all the relevant information the Commissioner is satisfied that it was reasonable for the qualified person to conclude that sections 36(2)(b)(ii) applied to the withheld information.
23. In terms of its application of section 36(2)(c) the University's position is that the prospect of disclosure would essentially lead to less open and transparent minutes being taken in the future which could lead to lower quality decision making, which would prejudice its public role (paragraph 19 (a) above).
24. The Commissioner has accepted that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation and reached the view that section 36(2)(b)(ii) is engaged. However, the Commissioner notes that it is the University's current practice to record particularly sensitive or confidential discussions at Board of Governor's meetings within confidential appendices (the withheld information) which are not published. The Commissioner does not consider that the University has provided sufficient detail to explain exactly how disclosure would be likely to lead to shorter and less detailed published minutes. In addition, even if disclosure did result in less detailed minutes being produced in the future, the University has not demonstrated how less detailed *minutes* of discussions, as opposed to less open discussion and deliberations themselves, would be likely to lead to lower quality decision making. This is because, in the Commissioner's opinion,

minutes record the outcome of decision making but are not used as the basis for decision making itself.

25. The University has also argued that section 36(2)(c) is engaged because disclosure would be likely to prejudice its own financial interests and RWCMD's financial interests. However, its arguments in relation to this point very closely mirror its representations in relation to the application of section 43.
26. The Commissioner's approach to section 36(2)(c) is that it should only be cited where none of the other exemptions in part II of the FOIA are relevant. In *McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008)*², the Information Tribunal supported the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. As such, if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.
27. In light of the above, the Commissioner has no option but to conclude that, in relation to section 36(2)(c) the qualified person's opinion is not reasonable. It follows that the Commissioner does not find section 36(2)(c) to be engaged.

Public interest test – section 36(2)(b)(ii)

28. As the Commissioner has determined that section 36(2)(b)(ii) is engaged she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner*³ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

³

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (paragraph 88)

29. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and *“thus does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant”* (paragraph 91). Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosure

30. The University accepts that there is a public interest in openness and transparency relating to the subject matter associated with the request ie the future funding position and sustainability and governance arrangements of the RWCMD. However, it considers the public interest in the matter has been largely met through the routine publication of non-confidential minutes.
31. In his original complaint to the Commissioner the complainant pointed out that the Welsh Government had asked Lord Murphy to conduct a review into the management of the RWCMD. He considers that there is *“an overriding public interest in knowing how the University Board has sought to deal with the concerns that have been expressed as to the relationship between the University and the RWCMD”*. In his complaint the complainant accepted that some matters may need to be redacted from the minutes.

Public interest arguments in favour of maintaining the exemption

32. The University contends that it requires a safe space to be able to discuss issues candidly to ensure robust governance. It also argues that there is a public interest in avoiding the *“potential detrimental effects which disclosure would be likely to have on the University’s ability to effectively carry out its tasks”*.
33. The University also considers that there is a public interest in avoiding *“the negative impact disclosure would have on University resources as issues considered to be of a private nature are made publicly available”*.

34. The University confirmed that the subject matter associated with the withheld information was ongoing at the time of the request and remained "*unresolved at Board level*". The future direction in terms of funding and governance issues associated with the RWCMD were still the subject of discussion. At the time of the meetings in question, the RWCMD was experiencing financial challenges arising from the way that higher education funding is allocated in Wales. Although the situation in relation to funding has now changed, the University confirmed that the matter of the financial sustainability of the RWCMD was very much a live issue at the date of the request. As such, the University considers that disclosure of the information has the potential to cause unnecessary disruption at a sensitive time for the RWCMD.

Balance of the public interest test

35. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to prejudice the effective conduct of public affairs, she must give weight to that opinion as valid evidence in her assessment of the balance of the public interest. However, she must also consider the severity, extent and frequency of the prejudice claimed.
36. The Commissioner acknowledges the public interest arguments in favour of disclosure. She notes that the complainant has real concerns over the relationship between the University and the RWCMD. She accepts that disclosure of the withheld information would enable the public to understand more closely what options were being explored and why. The Commissioner appreciates that disclosure of the withheld information may assist public debate and enable the public to scrutinise decisions made by the University and hold them to account where necessary.
37. The Commissioner recognises that, inherent in the section 36(2)(b) exemption is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues and subject experts can be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process.
38. In this case, the Commissioner notes that the subject matter associated with the withheld information was live at the time of the request. The Commissioner also notes the University's comments concerning the financial position of the RWCMD at the time the meetings took place, and that its financial sustainability was still a live issue at the time of the request.

39. In this case, considering the circumstances at the time of the request, the Commissioner is of the view that the public interest rests in maintaining this exemption. At the time of the request the University was still in the process of deliberation. It was still considering its options and debating these internally in a free, frank and candid manner. She accepts that despite any concerns regarding the relationship between the University and the RWCMD, the University is entitled to the free and private thinking space that is required in order to assess and deliberate on its options. Safe space is required especially when the issues under discussion are still live and in the development/proposal stage. At the time of the request, the Commissioner considers that there was a real likelihood that disclosure would hinder the University's ability to consider its options fully and discourage those staff involved in the process from participating in a free and frank way. These effects would be likely to be fairly extensive and severe and impact negatively on the University's ability to arrive at the most appropriate way forward
40. The Commissioner has considered the withheld information and the wider context that informs the public interest against the principles of transparency and accountability. For the reasons set out above, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs the public interest in disclosure.

Section 43 – commercial interests

41. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
42. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
- Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
 - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. The University considers that disclosure of the information requested in this case would be likely to prejudice both its own commercial interests and those of the RWCMD.

44. The University advised the Commissioner that the RWCMD is a charitable institution and dependent on the enrolment of students for its financial stability. Attracting and retaining students is, therefore, a key commercial activity for the RWCMD. As its parent company, the University is ultimately responsible for the financial viability of the RWCMD.
45. As mentioned in paragraph 34 above the RWCMD was experiencing financial challenges at the time the meetings took place and its financial sustainability was a live issue at the date of the request. The University explained that the higher education sector is extremely competitive. The withheld information contains a significant amount of information about the financial position of the RWCMD. The University considers that, if the information were disclosed, there is a real risk that it would adversely affect the RWCMD's commercial position in terms of recruiting and retaining students. Any decrease in the number of students would put significant financial pressure on the RWCMD and have a detriment on the commercial position of both the RWCMD (and in turn the University as its parent company).
46. The University confirmed that it had consulted with the RWCMD regarding the request and it had confirmed that it considered disclosure would prejudice its commercial interests for the reasons set out above.

The Commissioner's position

47. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - 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;
 - 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
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the

Commissioner's view this places a stronger evidential burden on the public authority to discharge.

48. The Commissioner accepts that the RWCMD operates in a commercial market as its relationship with potential students is a commercial one and highly competitive. The successful recruitment of students and staff is very much a commercial activity of the RWCMD and is critical to maintaining its ability to compete within the higher education sector. The Commissioner is therefore satisfied that the nature of prejudice envisaged to the University and the RWCMD's interests are ones that fall within the scope of the exemption provided by section 43(2).
49. The Commissioner's guidance observes that there may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. The guidance continues by saying it may be that releasing such information has a significant impact on revenue or threatens its ability to secure finance.
50. The Commissioner has had sight of the information which has been withheld under section 43. Taking into account the content of the withheld information and the University's arguments, she is prepared to accept that disclosure has the potential to adversely affect the RWCMD's ability to recruit and retain students. The Commissioner is therefore satisfied that the University has provided reasonable arguments to suggest that there is a causal link between disclosure of the requested information and the harm envisaged. Furthermore, the Commissioner is satisfied that the University has demonstrated that there is a real and significant risk of prejudice to its own and the RWCMD's commercial interests. She has therefore found that section 43(2) is engaged and gone on to consider the public interest test.

Public interest test

51. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

52. In respect of the public interest in favour of disclosure, the University submitted almost identical representations concerning openness and transparency as it did in relation to its public interest test considerations under section 36 (paragraph 30 above).

Public interest arguments in favour of maintaining the exemption

53. The University's arguments relating to the public interest in withholding the information are largely the same as those arguments explaining the likelihood of prejudice to the third parties. It referred to the potentially adverse factor that public concerns about the financial viability of RWCMD would have on its commercial ability to recruit and retain students and the advantage that disclosure would give to competitors in the sector.
54. The University considers that the public interest has been largely met through disclosure of the published minutes and it does not consider there is any overriding public interest which would outweigh the damaging effect disclosure would have on the RWCMD's commercial interests.
55. Again, the University pointed out that the subject of funding and the financial position of the RWCMD was very much a live, unresolved matter at the time the meetings took place and at the time of the request.

Balance of the public interest test

56. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities. In this case, disclosure would provide the public with a better understanding of the funding position of the RWCMD and the options being considered.
57. In reaching a view as to where the public interest lies in this case, the Commissioner has taken into account the subject matter associated with the withheld information (ie the financial sustainability of the RWCMD) was live at the time of the request and subject to further discussions and considerations. The Commissioner does not consider it is in the public interest to disclose information which would be likely to prejudice the RWCMD's ability to attract and retain students. In the Commissioner's view there is a stronger public interest in protecting the commercial interests of the RWCMD (and in turn the University as the parent company).
58. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Section 40 – the exemption for personal data

59. 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.
60. In this case the relevant condition is contained in section 40(3A)(a)⁴. 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').
61. 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.
62. 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?

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

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

64. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
65. 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.
66. 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.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

67. The withheld information in this case comprises details, including the name of an individual and their employer, who was proposed to be appointed to the RWCMD Board of Directors.
68. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
69. 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.
70. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

71. 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".

72. 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.
73. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

74. 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"⁵.

⁵ 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".

75. 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:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
76. 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

77. In considering any legitimate interest in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
78. 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.
79. The Commissioner accepts that there is a legitimate interest in knowing the identities of appointed Board Members. She understands that the RWCMD publishes a list of its Board members on its website. The
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However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

complainant has not submitted any specific reasons why the information withheld under section 40(2) should be disclosed.

80. The Commissioner has been unable to identify a specific legitimate interest in disclosure of the identity of the proposed appointee in this case. However, she accepts that, in the interests of transparency and accountability, there is a limited legitimate interest in disclosure of information about proposed appointments to the RWCMD Board.

Is disclosure necessary?

81. '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.
82. The Commissioner notes that within the appendices which have been disclosed the University has disclosed the fact that an individual was being considered as a proposed member of the RWCMD Board. It has also disclosed information about the reasons why the individual was not subsequently appointed. The only information which the University has withheld is information that identifies the individual in question.
83. The Commissioner considers that any legitimate interest, and any wider societal legitimate interests, have, to a large extent, been satisfied through the information which the University has already released relating to the proposed appointment. The complainant has not provided any reasons or arguments to support a position that any of their own interests can only be satisfied through release of the identity of the individual. In light of the fact that the appointment of the individual did not go ahead the Commissioner considers that disclosure of their identity would seem to be disproportionately intrusive to meet any legitimate interest of the public as it would reveal information about them which is not otherwise in the public domain.
84. The Commissioner has therefore decided in this case that disclosure is not necessary to meet any legitimate interest in disclosure and she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
85. The Commissioner has therefore decided that the University was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

86. 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

87. 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.
88. 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

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